TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1382. 934

THE STATE OF KANSAS EX REL: J. F. TUFTS, ASSISTANT ATTORNEY GENERAL OF THE STATE OF KANSAS FOR ATCHISON COUNTY, KANSAS, APPELLANT,

vs.

HERMAN ZIEBOLD AND JOSEPH HAGELIN, PARTNERS AS ZIEBOLD AND HAGELIN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED APRIL 25, 1887.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Transcript from State court	1	1
Petition	1	1
Notice	5	3
Answer	6	4
Petition for removal	8	5
Bond for removal	14	8
Order denying removal and granting injunction	17	10
Clerk's certificate	19	11
Plea	20	11
Answer to plea	26	15
Affidavit of J. F. Tufts	27	15
Herman Ziebold	30	17
Joseph Hagelin	34	20
Julius Kuhn	36	20
Albert Weinman	38	21
Alfred Meier	40	22
George Ostertag	42	23
Henry Luth	44	24

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	Original.	Print.
Affidavit of Joseph Cook	46	24
Adam Dilgert	48	26
Theodore Frank	50	28
Order overruling plea in abatement, &c.	52	29
Bill of complaint	53	29
Exhibit A—Act of the legislature of the State of Kansas to prohibit the manufacture and sale of liquors, &c., approved February 19, 1881	60	33
B—An act of the legislature of the State of Kansas amendatory of chapter 128 of session laws of 1881, approved March 7, 1885	75	42
C—An act of the legislature of the State of Kansas to restrain dram-shops and taverns, &c., approved March 3, 1868	88	50
Answer	94	53
Decree	105	59
Bond	106	60
Clerk's certificate	108	60
Citation and service	109	61
Appeal	110	61

1 Be it remembered that heretofore, to wit, on the 13th day of August, A. D. 1886, there was filed in the office of the clerk of the district court within and for the county of Atchison and State of Kansas a certain petition wherein the State of Kansas *ex rel.* J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, was plaintiff and Herman Ziebold and Joseph Hagelin, partners as Ziebold and Hagelin, were defendants, and which petition is in the words and figures following, to wit:

Petition.

STATE OF KANSAS, *Atchison County,* } *ss:*

In the District Court of the Second Judicial District in and for Atchison County.

THE STATE OF KANSAS *ex rel.* J. F. TUFTS, Assistant Attorney General of the State of Kansas for Atchison County, Plaintiff,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold and Hagelin, Defendants.

I, J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, for and on behalf of the State of Kansas, come now and give to the court the information that it may be informed and understand that a certain group of buildings, composed of wood, stone, and brick and known as "the brewery," situated upon a part of the southeast quarter and a small adjoining part of the southwest quarter of section one (1), township six (6), range twenty (20), in Atchison county, Kansas, and owned by the defendants Ziebold and Hagelin, is a place where spirituous, vinous, fer-
2 mented, malt, and other intoxicating liquors are, and have been for several months last past, bartered, sold, and given away, and where intoxicating liquors are kept for barter, sale, and gift, in violation of law, and are manufactured for barter, sale, and gift, in the State of Kansas, in violation of law.

That the said place in consequence thereof is a common nuisance to the people of the State of Kansas, and especially to the people of the city of Atchison and city of Atchison, in the State of Kansas.

That the defendants, Herman Ziebold and Joseph Hagelin, partners as Ziebold and Hagelin, are the keepers and maintain and operate said place as a place where spirituous, vinous, fermented, malt, and other intoxicating liquors are sold, bartered, and given away, and are kept for sale, barter, and gift, and are manufactured for barter, sale, and gift in the State of Kansas.

That the defendants have no permit granted or issued by the probate judge of Atchison county, Kansas, authorizing the said defendants to sell, barter, or give away, or keep for barter, sale, or gift, any intoxicating liquors, or to manufacture intoxicating liquors for any purpose.

That the defendants Ziebold and Hagelin are the owners of the premises above described and have full knowledge of the purpose

for which said place is being used, and know that the said premises are being used as a place where intoxicating liquors are sold, bartered, and given away, and are kept for barter, sale, and gift, and are manufactured for barter, sale, and gift in the State of Kansas, and that the defendants and each of them have no permit issued according to law by the probate judge of Atchison county, Kansas;

3 and, knowing the fact, the defendants conduct and carry on the said illegal business therein and maintain the said common nuisance; that the said place is a common nuisance, of great injury to the public, which injury is irreparable and cannot be compensated in damages.

Wherefore the said J. F. Tufts, as assistant attorney general, as aforesaid, for and on behalf of the State of Kansas, prays—

First. That the premises, to wit, a certain group of buildings, composed of wood, stone, and brick and known as "the brewery," situated upon a part of the southeast quarter and a small adjoining part of the southwest quarter of section one (1), township six (6), of range twenty (20), in Atchison county, Kansas, and owned by defendants Ziebold and Hagelin, may be adjudged to be a common nuisance, and that an order may issue directing the sheriff or other proper officer to shut up and abate said place.

Second. That the defendants and each of them may be perpetually enjoined from using or permitting to be used the said premises as a place where intoxicating liquors are sold, bartered, or given away, or are kept for barter, sale, or gift, otherwise than by authority of law.

Third. That, in the meantime, the said defendants may be enjoined until the further order of the court from keeping open or permitting to be open the said certain group of buildings, composed of wood, stone, and brick, known as "the brewery," situated upon a part of the southeast quarter and a small adjoining part of the southwest quarter of section one (1), township six (6), of range twenty (20), in Atchison county, Kansas, and — by defendants, Ziebold and Hagelin, and from selling, bartering, or giving away and from keeping for sale, barter, or gift, or use in or about said premises, or manufacturing for barter, sale, or gift in the State of Kansas, any malt,

4 vinous, spirituous, fermented, or other intoxicating liquors, and from permitting such liquors to be sold, bartered, or given away or to be kept for sale, barter, or use at, in, or about said premises, or manufactured for barter, sale, or gift in the State of Kansas.

Fourth. And said J. F. Tufts, as such assistant attorney general of the State of Kansas for Atchison county, for and on behalf of the State of Kansas, prays that such other and further relief may be given as may be warranted by law and the exigencies of the case may require.

J. F. TUFTS,
Assistant Attorney General for the State of Kansas for Atchison County.

STATE OF KANSAS, *Atchison County,* } ss:

J. F. Tufts, of lawful age, and being by me first duly sworn, deposeth and says that he is assistant attorney general of the State of Kansas for Atchison county; that he has read and heard read the above and foregoing petition, and knows the facts and statements therein set forth and representations therein made to be true in fact and substance.

J. F. TUFTS.

Subscribed and sworn to before me this 13th day of August, 1886.
[SEAL.] JOHN MOORE, *Clerk,*
By J. J. BOYDE,
Deputy Clerk.

Endorsed: No. 62. In the district court of Atchison county, Kansas. State of Kansas *ex rel.* J. F. Tufts, ass't att'y gen'l, plaintiff, *vs.* Herman Ziebold and Joseph Hagelin, partners as Ziebold & Hagelin, defendants. Filed Aug. 13, 1886. John Moore, clerk, by J. J. Boyde, deputy clerk. J. F. Tufts, attorney for the State.

5 *Notice.*

In the District Court of Atchison County, Kansas.

THE STATE OF KANSAS *ex rel.* SIMEON B. BRADFORD, Attorney General, Plaintiff,
vs.
HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold and Hagelin, Defendants.

The above-named defendants will take notice that an application will be made to the judge of the second judicial district, at his chambers at the court-house, in the city of Atchison, in Atchison county, Kansas, on the 14 day of August, 1886, at 10 o'clock, or as soon thereafter as the same can be heard, for restraining order or temporary injunction, according to the prayer of the petition now on file.

Affidavits and oral testimony will be used on the hearing of said application.

Dated 12th day of August, 1886.

J. F. TUFTS,
Assistant Attorney General of Kansas for Atchison Co.

Endorsed: State *vs.* Ziebold and Hagelin. Notice.

Received this notice of application for restraining order or temporary injunction on the 13th day of August, A. D. 1886, and on said 13th day of August, A. D. 1886, I served the same in my county, Atchison, on the within-named Herman Ziebold and
6 Joseph Hagelin by delivering to each of them in person a true and certified copy of this same notice, with the endorsements thereon.

Given under my hand this 14th day of August, 1886.

F. E. SHAW, *Sheriff.*

Sheriff's fees:

2 copies	50
1st service	50
2d do.	25
Mileage	30
	$1 55

Filed Aug. 14, 1886.

JOHN MOORE, *Clerk,*
By J. J. BOYD,
Deputy Clerk.

Afterward, to wit, on the 15th day of August, A. D. 1886, came the said defendants and filed their certain answer to the petition of the said plaintiff in the clerk's office of said district court, and which said answer is in the words and figures following, to wit:

Answer.

In the District Court, Atchison County, State of Kansas.

THE STATE OF KANSAS *ex rel.* J. F. TUFTS, Assistant Attorney General for the State of Kansas for Atchison County, Kansas, Plaintiff,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Defendants.

Now come said defendants and, for answer to the petition of plaintiff filed herein, say—

7 First. That they deny each and every allegation, statement, and averment therein contained.

Second. Defendants, further answering, say that the buildings and premises mentioned and described in plaintiff's petition were erected by these defendants prior to the passage of what is known as the prohibitory law of the State of Kansas and the constitutional amendment prohibiting the sale and manufacture of intoxicating liquors for other than medicinal, scientific, and mechanical purposes.

That at the time said building and buildings were erected they — erected for the purpose of manufacturing beer, and are adapted for no other purpose whatever, and can be used for no other purpose; that they are of the value of sixty thousand dollars, and if said defendants shall be prevented from the operation thereof for the purposes for which they were erected that the same will be wholly lost to these defendants.

And these defendants say that the proceedings herein is an attempt to take the property of these defendants for public use and without compensation being made to them, and that the law of the State of Kansas under which this proceeding is being had is unconstitutional and in contravention of the fourteenth amendment to

the Constitution of the United States of America, and that if the said injunction shall be granted against these defendants said property will be wholly lost and destroyed, as aforesaid, and these defendants damaged in the full sum of $60,000.00 *dollars.*

Wherefore these defendants pray that said proceedings herein be dismissed and that they have judgment for costs.

JOHN C. TOMLINSON AND
EVEREST & WAGGENER,
Attorneys for Defendants.

8 Endorsed: State of Kansas *ex rel.* J. F. Tufts. Answer. Filed Aug. 15th, 1886. John Moore, clerk.

Thereupon, to wit, on the 15th day of August, A. D. 1886, came the said defendants, Herman Ziebold and Joseph Hagelin, partners as Ziebold and Hagelin, and filed their certain petition and bond for removal to the circuit court of the United States for the district of Kansas, and which said petition and bond for removal are in the words and figures following, to wit:

Petition for Removal to the Circuit Court of the United States for the District of Kansas.

In the District Court of Atchison County, State of Kansas.

THE STATE OF KANSAS *ex rel.* J. F. Tufts, Assistant Attorney General of the State of Kansas, Plaintiff,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold and Hugelin, Defendants.

The petition of Herman Ziebold and Joseph Hagelin, partners as Ziebold and Hagelin, respectfully represents that they are citizens of the State of Kansas, and of the United States of America, and that the amount in controversy herein, exclusive of costs, exceeds the sum of five hundred dollars.

9 That your petitioners claim that the law under which this proceeding has been instituted is in conflict with the Constitution of the United States of America and therefore void, and that if void your petitioners have the right to carry on and prosecute their lawful business, and that any interference therewith by virtue of the proceedings herein instituted will damage your petitioners largely in excess of five hundred dollars, exclusive of costs.

Your petitioners further allege that the amount of property involved in this controversy and which will be affected by a decision of this action is of the value of more than five hundred dollars, exclusive of costs herein.

Your petitioners further say that said suit is brought for the purpose of restraining and enjoining your petitioners from the maintenance of an alleged nuisance.

Your petitioners further allege that said suit is instituted by the State of Kansas on the relation of J. F. Tufts, the assistant attorney

general of said State for Atchison county, is a suit arising under the Constitution and laws of the United States of America, and that a correct decision of said case and the questions therein involved depends upon the construction of the Constitution of the United States, and especially that portion of said Constitution which reads as follows:

"Article IV. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

And also that portion of section 1, article XIV, of the Con-
10 stitution of the United States which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the law.

That, notwithstanding said provisions of the Constitution of the United States of America, the Legislature of the State of Kansas, by an act entitled An act amendatory of and supplemental to chapter one hundred and twenty-eight of the session laws of 1881, being an act entitled An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes, approved March 7, 1885, provided by section one of said act that it shall be unlawful for any person or persons to sell or barter for medical, scientific, or mechanical purposes any malt, vinous, spirituous, fermented, or other intoxicating liquors without first having procured a druggist's permit therefor from the probate judge of the county wherein such druggist may at the time be doing business, &c.

That this suit is brought and prosecuted against the defendants because, and only because, it is claimed that said defendants had not taken out and procured a druggist's permit, and because no permit had been granted or issued by the probate judge of Atchison county, Kansas, authorizing the said defendants to sell, barter, or give away, or to keep for barter, sale, or gift, any intoxicating liquors, and to manufacture beer.

That it is not alleged or pretended that said defendants *is* or *has*
11 been engaged in the traffic or sale of intoxicating liquors for other than medical, scientific, and mechanical purposes, but that the place where said defendants *is* alleged to be and to have been engaged in the sale of intoxicating liquors is claimed and pretended to be a nuisance, because and only because it is alleged that defendants *has* no permit granted or issued by the probate judge of Atchison county, Kansas, authorizing the said defendants to sell, barter, or give away, or keep for barter, sale, or gift, any intoxicating liquors, and to manufacture beer in said buildings, and defendants *is* sought to be enjoined from the prosecution of said

business, because it is alleged that they have not taken out and obtained a permit from said probate judge, and for that reason alone it is claimed and pretended that said defendants' place of business should be shut up and abated as a public nuisance, and that, upon a judgment of this court finding such place to be a nuisance under the provisions of section thirteen of said act hereinbefore referred to, *that* the sheriff of Atchison county, Kansas, his deputy or under sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining such alleged nuisance.

Said defendants claim, aver, and state that long prior to the passage of said acts by the Legislature, and prior to the year 1881 and since 1870, these defendants had erected, constructed, and built certain buildings, described in plaintiff's petition, of brick and stone for the sole use of making and manufacturing beer therein, and purchased and placed therein costly and expensive machinery for the sole use of making and manufacturing beer, as hereinbe-
12 fore alleged; that said buildings and machinery can only be used for the purpose of making and manufacturing beer, and *is* useless and entirely worthless for any other purpose, and that said buildings and machinery are not adapted for any other purpose; that the laws of the State of Kansas authorized and permitted the making and manufacturing of beer and the sale thereof without any permit, as is now required, when said buildings were constructed and machinery placed therein by these defendants.

That if these defendants are not allowed to use said buildings and machinery for the manufacture of beer, for which such buildings were erected and said machinery purchased, it will render said property useless for any other purpose, and will be of no value whatever, and will financially ruin and bankrupt these defendants.

And said defendants state that the value of said buildings when constructed was then and now is $50,000.00, and the machinery therein was and is worth the sum of $10,000.00, total costs and value of said buildings and machinery being the sum of $60,000.00.

These defendants claim and aver that said provisions of said act of the Legislature of the State of Kansas, hereinbefore referred to, as well as each section and provision thereof under which the right is claimed to prosecute this action, is class legislation, and in effect abridges the privileges and immunities of your petitioners as citizens of the State of Kansas and of the United States of America, and its enforcement would deprive these defendants of their property without the due process of law, and deny your petitioners the equal protection of the law, and would subject these defendants to unreasonable search and *his* property to unreasonable seizure and destruction without probable cause thereof, and that said law and all the provisions thereof *is* void and in conflict with and in contravention of said section one (1), article fourteen (14), of the Consti-

tution of the United States, as also said article four (4) of said
13 Constitution of the United States of America.

And your petitioners aver that a correct decision of this suit involves a Federal question and cannot be decided correctly without determining whether said act of the Legislature of the State of Kansas, hereinbefore referred to, and the provisions thereof under which this suit is prosecuted, is in conflict with and in contravention of said section one, article fourteen, of the Constitution of the United States, and also article four of the Constitution of the United States.

Your petitioners make and file herewith a bond, with good and sufficient security, for entering into the circuit court of the United States for the district of Kansas, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit has been wrongfully or improperly removed thereto.

Your petitioners therefore pray this honorable court to accept this petition and said bond, and order the transfer of said suit to the said circuit court of the United States for the district of Kansas.

EVEREST & WAGGONER AND
TOMLINSON & EATON,
Attorneys for —.

14 UNITED STATES OF AMERICA, *District of Kansas:*

We, Herman Ziebold and Joseph Hagelin, being duly sworn depose and say that they are the petitioners named in the above and foregoing petition, and that they have heard read the same and know the contents thereof, and that the same is true of their own knowledge.

HERMAN ZIEBOLD.
JOSEPH HAGELIN.

STATE OF KANSAS, } ss:
Atchison County, }

Subscribed in my presence by Herman Ziebold and Joseph Hagelin, and sworn to by them before me this 16 day of August, A. D. 1866.

Witness my hand and notarial seal.

[SEAL.]

J. P. ADAMS,
Notary Public.

My com. expires 4 June, 1888.

Endorsed: The State of Kansas *ex rel.* J. F. Tufts *vs.* Ziebold & Hagelin. Filed Aug. 16, 1886. John Moore, clerk.

Bond.

Bond for the removal of a cause under the act of March 3, 1875.

Know all men by these presents that Herman Ziebold and Joseph Hagelin, partners as Ziebold and Hagelin, as principals, and Julius Kuhn and John M. Seitz, as sureties, are held and firmly bound

unto the State of Kansas and to J. F. Tufts, the assistant attorney general of said State, in the penal sum of five hundred dollars; for the payment whereof, well and truly to be made, unto the said State of Kansas and J. F. Tufts, the assistant attorney general of said State for Atchison county, its representatives and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Herman Ziebold and Joseph Hagelin, partners as Ziebold and Hagelin, having petitioned the district court of Atchison county, State of Kansas, for the removal of a certain cause therein pending, wherein The State of Kansas *ex. rel.* J. F. Tufts, assistant attorney general of said State for Atchison county, — plaintiff and Herman Ziebold and Joseph Hagelin, partners as Ziebold and Hagelin, are defendants, to the circuit court of the United States in and for the district of Kansas:

Now, if the said Herman Ziebold and Joseph Hagelin, partners as Ziebold and Hagelin, your petitioners, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 16th day of August, A. D. 1886.

JOSEPH HAGELIN.
HERMAN ZIEBOLD. [L. S.]
ZIEBOLD AND HAGELIN.
JULIUS KUHN. [L. S.]
JOHN M. SEITZ. [L. S.]

STATE OF KANSAS, } ss:
County of Atchison, }

I, John M. Seitz and Julius Kuhn, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Kansas, and a property holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Kansas liable to execution of the value of more than five hundred dollars.

JULIUS KUHN.
JOHN M. SEITZ.

Subscribed in my presence by John M. Seitz and Julius Kuhn and by *him* sworn to before me this 16th day of August, A. D. 1886.

Witness my hand and notarial seal.

[SEAL.]

J. P. ADAMS,
Notary Public.

My com. expires 4 June, 1888.

Endorsed: Bond for removal of cause under act of 1875. In the district court of Atchison county, Kansas. The State of Kansas *ex rel.* J. F. Tufts, assistant attorney general of said State for Atchison

county, Kansas, plaintiff, against Herman Ziebold and Joseph Hagelin, partners as Ziebold and Hagelin, defendants. Bond for the removal of said cause to the circuit court of the United States for the district of Kansas under act of March 3, 1875. Filed the 16th day of Aug., 1886. John Moore, clerk.

17 *Order in Vacation.*

In the District Court, Atchison County, State of Kansas. In Vacation.

THE STATE OF KANSAS *ex rel.* J. F. TUFTS, Assistant Attorney General of the State of Kansas for Atchison County, Plaintiff,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold and Hagelin, Defendants.

Now, on this 4th day of August, 1886, this cause coming on to be heard before Hon. D. Martin, sole judge of above-entitled court, at chambers, at the court-house at Atchison, Kansas, upon the application of plaintiff for a temporary injunction herein;

And plaintiff appearing by J. F. Tufts, its attorney, and defendants appearing in person and by Tomlinson and Eaton and Everest and Waggoner, their attorneys:

Thereupon, by consent, the further hearing of said matters is continued until August 19th, 1886, at same place.

And now, on August 19th, 1886, said matters coming on for further hearing, at same place, and all parties appearing as before, the said defendants filed answer herein, and also petition and bond for removal to United States circuit court; and the said judge, having heard said application upon said petition and bond and the argument of counsel thereon, doth continue the further hearing of said matters until August 21st, 1886, at same place.

And now, on August 21st, 1886, said matters coming on for
18 further hearing before said judge, at same place, and all parties appearing as before, said matters *is* by said judge continued until August 28th, 1886, for further hearing, at same place.

And now, on August 28th, 1886, said matters coming on before said judge, at same place, for further hearing, all parties appearing as before, and said judge being fully advised in the premises, the said application upon said petition and bond for such removal to United States court is overruled and denied, defendants duly excepting.

And thereupon, said matters coming on to be heard upon the application of plaintiff for a temporary injunction herein, and the said judge, having heard the evidence and argument of counsel thereon, doth find that the statements and allegations of the petition herein *was* true.

It is, therefore, ordered that the said defendants and each of them be, and is hereby, enjoined, until the further order of the court, from keeping open or permitting to be open the said certain group of buildings, composed of wood, stone, and brick, known as "The Brewery," situated upon a part of the southeast quarter and a small ad-

joining part of the southwest quarter of section one (1), township six (6), of range twenty (20), in Atchison county, Kansas, and owned by defendants Ziebold and Hagelin, and from selling, bartering, or giving away, and from keeping for sale, barter, or gift or use in or about said premises, or manufacturing for barter, sale, or gift, in the State of Kansas, any malt, vinous, spirituous, fermented, or other intoxicating liquors, and from permitting such liquors to be sold, bartered, or given away, or to be kept for sale, barter, or use, at, in, or about said premises, or manufactured for barter, sale, or gift in the State of Kansas.

19 To all of which defendants at the time duly excepted.

D. MARTIN,
District Judge.

Endorsed: In district court, Atchison county, Kansas. State of Kansas *ex rel.* Tufts *vs.* Ziebold & Hegelin. Order in vacation. Filed Aug. 28th, 1886. John Moore, clerk, by J. J. Boyd, deputy clerk.

THE STATE OF KANSAS, } ss:
County of Atchison, }

I, John Moore, clerk of the district court within and for the county of Atchison and State of Kansas, do hereby certify the above and foregoing to be a full, true, and complete transcript of the record in the above-entitled cause as fully as the same remain on file and of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at my office in the city of Atchison and State of Kansas, this 3rd day of September, A. D. 1886.

[SEAL.]

JOHN MOORE, *Clerk,*
By J. J. BOYD,
Deputy Clerk.

Endorsed: No. 5677. The State of Kansas *ex rel.* J. F. Tufts, assistant attorney general, etc., *vs.* Ziebold and Hagelin. Transcript. Filed Sept. 7, 1886. A. S. Thomas, clerk, by Frank H. Holt, deputy.

20 In the Circuit Court of the United States for the District of Kansas.

THE STATE OF KANSAS on the Relation of J. F. TUFTS, Assistant Attorney General for the State of Kansas for Atchison County, Kansas, Plaintiff,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold & Hagelin, Defendants.

The plea of the State of Kansas *ex rel.* J. F. Tufts, assistant attorney general, etc., plaintiff, to the petition for removal to the circuit court of the United States for the district of Kansas, of Herman Ziebold and Joseph Hagelin, partners as Ziebold & Hegelin, defendants.

This complainant, by protestation, not confessing or acknowledging all or any of the matters in the said petition for a removal of

this cause to this court to be true in such manner and form as the same are therein and thereby set forth and alleged, doth plead thereto in the nature of a plea in abatement and to the jurisdiction of this court, and for such plea says: that the court ought not to take cognizance of or sustain the removal of said action, but ought to remand said case to the district court of Atchison county, Kansas, because—

First. The said defendants, Herman Ziebold and Joseph Hagelin, partners as Ziebold & Hagelin, were at the time of the commencement of said suit citizens of the State of Kansas, and subject to the jurisdiction thereof.

21 Second. That the petition filed in said cause by this plaintiff is for the purpose of having the premises described therein adjudged to be a common nuisance to the people of the State of Kansas, because the same is a place where spirituous, vinous, fermented, malt, and other intoxicating liquors are, and have been for several months last past, bartered, sold, and given away, and where intoxicating liquors are kept for barter, sale, and gift, in violation of law, and are manufactured for barter, sale, and gift in the State of Kansas, and to perpetually enjoin said defendants from using or permitting to be used the said premises as a place where intoxicating liquors are sold, bartered, or given away, or kept for barter, sale, or gift, otherwise than by authority of law, and are manufactured for barter, sale, and gift in the State of Kansas, and for no other purpose whatever.

Fourth. That all rights, interests, estate, and title in and to said premises vested in said defendants were acquired with a full knowledge that all places where intoxicating liquors are sold in violation of law were, by the statutes of said State of Kansas, declared to be a common nuisance, and directed to be shut up and abated as public nuisances.

Fifth. That none of the malt, vinous, spirituous, fermented, or other intoxicating liquors now in possession of said defendants on said premises, the barter, sale, or gift of which, in violation of the laws of the State of Kansas, is sought to be enjoined in this action, was in existence prior to the adoption of the constitutional amendment prohibiting the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and the enactment of said acts by the Legislature of the State of Kansas.

Sixth. That at the time said defendants erected the build-

22 ings and the appurtenances on the premises described in plaintiff's petition, and at the same time said defendants acquired their present rights, interests, estate, and title to said premises, the sale, barter, and giving away of spirituous, vinous, fermented or other intoxicating liquors, without first taking out and having a license or permit, was prohibited by the law of said State, punished by fine and imprisonment, and all places where such liquors were sold or given away in violation of law were declared to be common nuisances, and directed to be shut up and abated as such.

Seventh. And said plaintiff avers that the granting and allowance of the perpetual injunction prayed for in plaintiff's petition and the

granting of any other or further relief prayed for in said petition will not destroy the value of the premises described in said petition; that the value of said premises will not be lost to said defendants by reason of this proceeding; that the same can be readily adapted to other purposes than the sale and keeping for sale of beer and the manufacturing of the same for sale, barter, or gift in the State of Kansas; that the same will be valuable for such other purposes as well as for selling and keeping for sale of beer and the manufacturing of the same for sale, barter, and gift in the State of Kansas; that said defendants are not restricted by reason of this proceeding from the free exercise, control, and enjoyment and use of said premises for any lawful purpose, or for any purpose whatever, except the barter, sale, or gift, the keeping for barter, sale, or gift, of intoxicating liquors, and the manufacture of the same for barter, sale, or gift in the State of Kansas; that the said defendants are not by this proceeding deprived of the free and unrestricted use and enjoy-
23 ment of these premises for the purpose of preparing and manufacturing beer for other markets and for sale, barter, or gift in other States; that the premises described in plaintiff's petition, and the buildings thereon and machinery therein, are as valuable for such purpose of manufacturing for sale in such other States and countries as if used for the purpose of manufacturing for sale, barter, or gift in this State; that this proceeding nor a judgment and decree in accordance and in pursuance of the prayer of plaintiff's petition herein will not operate to deprive said defendant of said property for public use and without compensation, will not operate to deprive said defendants of the use of said property for public use, and without compensation or without due process of law, and will not operate to deprive said defendants of the value of said property, or of the use thereof, but that said defendants will have and retain the said premises by as good a right, title, and estate as heretofore, unimpaired by this proceeding, and will have and retain the free and unrestricted use and enjoyment of said premises for all purposes whatever, except for the purpose of sale, barter, or gift, or keeping for sale, barter, or gift, intoxicating liquors, and the manufacture of the same for barter, sale, or gift in the State of Kansas, and that said premises will remain of nearly the same value to said defendant as heretofore.

Eighth. That said plaintiff denies that — suit is a suit arising under the Constitution and the laws of the United States, and said plaintiff denies that a correct decision of said case and the questions therein involved depends upon the construction of the Constitution and the laws of the United States; said plaintiff particularly denies that the same depends upon the construction of the 4th and 14th amendments to the Constitution of the United States, and
24 plaintiff denies that the provisions of said act of the Legislature of the State of Kansas, as hereinbefore referred to, is class legislation, or abridges in any manner the privileges and immunities of said defendants as citizens of the State of Kansas, or as citizens of the United States, or that its enforcement would deprive said defendants of their property without due process of law, or deny to said

defendants equal protection by the law, or would subject said defendants to unreasonable search, and their property to unreasonable seizure or destruction without probable cause therefor; and said plaintiff denies that said law, or any of the provisions thereof, is void or in conflict with or in contravention to section 1 of article 14 of the Constitution of the United States, or of article 4 of the amendments of the Constitution of the United States; and said plaintiff avers that no Federal question is involved in such proceeding whatever; and the said State of Kansas pleads these facts to said petition for the removal of this said cause to this court by said defendants, Herman Ziebold and Joseph Hagelin, partners as Ziebold & Hagelin, and to the jurisdiction of this court herein and in abatement of further proceedings herein by this court, and demands judgment of this honorable court whether it ought to be compelled to proceed further in said cause in this court, and prays that said cause be remanded to the district court of Atchison county, Kansas, with its reasonable costs in this behalf most wrongfully sustained against said defendant.

J. F. TUFTS,
Assistant Attorney General of the State of Kansas for Atchison County, Solicitor and Att'y for Pl't'ff.

I hereby certify that I am solicitor and of counsel for the
25 plaintiff in the foregoing cause, and that, in my opinion, the foregoing plea is well founded in point of law.

S. B. BRADFORD,
Att'y General of Kans. & of Counsel.

UNITED STATES OF AMERICA, *District of Kansas.* } *ss:*

J. F. Tufts, of lawful age, and being by me first duly sworn, deposeth and says that he is assistant attorney general of the State of Kansas for Atchison county; that he has read and heard read the above and foregoing plea, and knows the facts and statements therein set forth and representations therein made, and that the same *is* true as he verily believes.

J. F. TUFTS.

Subscribed and sworn to before me this 23d day of Sept., 1886.
[SEAL.] PATRICK HAYES,
Notary Public.

Com. exp. Jan'y 19, '87.

Endorsed: No. 5677. The State of Kansas *ex rel. vs.* Ziebold & Hagelin. Plea in the nature of a plea in abatement and to the jurisdiction of this court. Filed Oct. 28, 1886. A. S. Thomas, clerk, by Frank H. Holt, deputy.

26 *Answer.*

In the Circuit Court of the United States for the District of Kansas.

STATE OF KANSAS on the Relation of J. F. TUFTS, Assistant Attorney General for the State of Kansas for Atchison County, Kansas, Plaintiff,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold & Hagelin, Defendants.

Now come the said defendants, Herman Ziebold and Joseph Hagelin and, for their answer to the plea in abatement filed herein by said plaintiff, allege and say that they deny the truth of each and every statement, averment, and allegation in said plea in abatement contained that is inconsistent with and that does not admit of the allegations and statements of defendants' petition for removal of this case to the circuit court of the United States. Wherefore these defendants ask judgement as in their petition for removal prayed for.

EVEREST & WAGGONER &
TOMLINSON & EATON,
Attorneys for Defendants.

Endorsed: No. 5677. State of Kans. *ex rel.*, pl'ff, *vs.* Ziebold & Hagelin, def'ts. Answer. Filed Oct. 28, 1886. A. S. Thomas, clerk, by Frank H. Holt, deputy. —— ——, att'ys for def'ts.

27 *Affidavit.*

STATE OF KANSAS, } *ss:*
Atchison County, }

In the Circuit Court of the United States for the District of Kansas.

THE STATE OF KANSAS *ex rel.* J. F. TUFTS, Assistant Attorney General of the State of Kansas for Atchison County, Pl'ff,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold & Hagelin, Def'ts.

J. F. Tufts, of lawful age, being first duly sworn, on oath says that said defendants, Herman Ziebold and Joseph Hagelin, partners as Ziebold and Hagelin, are, and at the time this action was begun in the district court of Atchison county, Kansas, were, citizens of the State of Kansas and subject to the jurisdiction thereof; that the petition filed in said cause by this plaintiff is for the purpose of having the premises described therein adjudged to be a common nuisance to the people of the State of Kansas, because the same is a place where spirituous, vinous, fermented, malt and other intoxicating liquors are, and have been for several months last past, bartered, sold and given away, and where intoxicating liquors are kept for barter, sale and gift in violation of law, and are manufactured for barter, sale and gift in the State of Kansas, and to perpetually enjoin said

defendants from using or permitting to be used the said premises as a place where intoxicating liquors are sold, bartered, or given away or kept for barter, sale, or gift, otherwise than by authority of law, and are manufactured for barter, sale, and gift in the State of Kansas,
28 and for no other purpose whatever; that all rights, interests, estate, and title in and to said premises vested in said defendants were acquired in August, 1871, with a full knowledge that all places where intoxicating liquors are sold in violation of law were by the statutes of said State of Kansas declared to be a common nuisance and directed to be shut up and abated as public nuisances; that said premises were used as a place where liquors were unlawfully sold as soon as same came into possession of defendants, and before May 1, 1881, and ever since said time, without any effort or attempt to comply with the laws of the State of Kansas; that none of the malt, vinous, spirituous, fermented, or other intoxicating liquors now in possession of said defendants on said premises, the barter, sale, or gift of which, in violation of the laws of the State of Kansas, is sought to be enjoined in this action, was in existence prior to the adoption of the so-called prohibitory amendment to our State constitution and the enactment of the State legislation now in force under said amendment; that said defendants never had nor tried to procure any township license under the dram-shop act, which took effect Oct. 31, 1868, and were, prior to May 1, 1881, conducting business in violation of law, and that said place and premises were liable to be abated and shut up as a public nuisance under said act of Oct. 31, 1868, entitled "An act to restrain dram-shops and taverns, and to regulate the sale of intoxicating liquors," and that same law was in effect at the time said defendants erected the buildings and the appurtenances on the premises described in plaintiff's petition, and at the time said defendants acquired their present rights, interests, and estate and title to said premises, except such improvements as have been made on said premises since May 1, 1881;
29 that said premises will not be destroyed, but only the use thereof rendered less valuable by reason of the granting of the order prayed for in this action; that this action is not a suit arising under the Constitution nor laws of the United States, and does not involve any Federal question not already fully decided by the Supreme Court of the United States.

J. F. TUFTS.

Subscribed and sworn to before me this 27 day of Sept., 1881.

[SEAL.] PATRICK HAYES,
Notary Public.

Com. exp. Jan'y 19, '87.

Endorsed: No. 5677. In U. S. circuit court for dist. of Kansas. The State of Kansas *ex rel.* Tufts *vs.* Ziebold and Hagelin. Affidavit. Filed Oct. 28, 1886. A. S. Thomas, clerk.

30 *Affidavit.*

STATE OF KANSAS, } ss:
Atchison County, }

In the Circuit Court of the United States, District of Kansas.

THE STATE OF KANSAS on the Relation of J. F. TUFTS, Assistant Attorney General of the State of Kansas for Atchison County, Kansas, Plaintiff,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold and Hagelin, Defendants.

Herman Ziebold, being by me first duly sworn, upon oath states: My name is Herman Ziebold. I am one of the defendants in the above-entitled case. My age is 50 years. I have been a resident of the State of Kansas since 1871. Affiant states that on or about the 1st of September, 1871, the said firm of Ziebold & Hagelin purchased the property described in defendants' petition for removal and in plaintiff's petition for injunction. The said property was erected and was, at the time of the purchase as aforesaid, used for manufacturing, making, and brewing beer, and the said firm of Ziebold & Hagelin purchased said property for the sole use of manufacturing, making, and brewing beer, and for no other purpose; that said property was then worth and was of the value of $25,000.00. Affiant further states that from and since the purchase of said buildings, as aforesaid, they have carried on the business therein of making, brewing, and manufacturing beer continuously until sought to be enjoined by the plaintiff in this action; that after the
31 purchase of said buildings and property they have, at various times since then, erected and made improvements thereto by putting up additional buildings cellars, and making other necessary improvements, and putting additional machinery therein for the purpose and for use in their said business as aforesaid, as hereinafter shown. Affiant states that in the year 1873 they built and constructed a patent ice-cellar attached to and adjoining said buildings, which cost and was worth to them *of the* and of the value of $5,000.00; that in 1875 they built another patent ice-cellar for the use and purpose of their business, adjoining to said buildings, of the value of $5,000.00; that during the year 1879 they constructed an addition to said buildings, purchased as aforesaid, and connected therewith, for use in their said business, which was of the value of $6,000.00; and during the same year they constructed an ice-cellar adjoining said buildings, for use in their said business, which cost and was worth and was of the value of $2,000.00; that since said time they have been forced to make necessary improvements of the cellars connected *connected* with said buildings as aforesaid, which cost and was worth and was of the value of $2,000.00. Affiant further states that prior to the 1st of January, 1880, and since September the 1st, 1871, they placed and put into said buildings a large

amount of machinery, appliances, bottles, and attachments for the sole and exclusive use of manufacturing, making, and brewing beer.

Affiant here submits a list of the personal property purchased as aforesaid, which also includes a recapitulation of the real estate and buildings and improvements made as aforesaid on said premises, to wit:

32 Real estate:

Value of the said buildings and property purchased as aforesaid	$25,000	
One patent ice-cellar	5,000	
" "	5,000	
Addition to original buildings	6,000	
Ice-house	2,000	
Repairing buildings and cellars	2,000	
Total		$45,000
Personal property:		
Engine and boilers	$800	
Shafting and elevator	300	
Tubs, vats, and cooling-ships	1,200	
Pipes and pumps	1,000	
Barrels	3,375	
Amount brought forward	6,675	
Kegs	1,000	
Mash-machine	300	
Malt-machine	300	
Fermenting-tubs	600	
Patent beer-cooler	300	
Total	9,175	$9,175
Total real estate and personal property		$54,175

Affiant further states that at the time the said pretended injunction, as shown from the record, was issued that the said firm of Ziebold & Hagelin had manufactured and had on hand and unsold beer and material for making beer—

Which beer was worth and was of the value of	$5,000
Malt, of the value of	300
Barley, of the value of	600
Hops of the value of	300
	$6,200

That the malt, barley, and hops on hand was kept and bought for the use of making, manufacturing, and brewing beer.

Affiant further states that at the time of the purchase of said brewery and buildings, machinery, and property connected therewith, and when they made the improvements thereon and purchased the machinery and appliances connected therewith that the laws of the State of Kansas permitted and
33 allowed the making, brewing, and manufacturing of beer, and such business was lawful; and affiant further states that the said firm of Ziebold & Hagelin purchased said property and made improvements thereon and bought machinery and appliances connected therewith, at the time aforesaid, for the sole and exclusive use and purposes of making, manufacturing, and brewing beer, and for no other purposes whatever; that said Ziebold & Hagelin have used all of said property in said business since the same was purchased, and have conducted no other business therein; that said property is not suitable and could not be used for any other business whatever, owing to the fact of the peculiar construction of said buildings and their location; that the cellars on said premises are built solely and expressly, at great expense, for storing beer therein, and the rooms and apartments of the buildings were constructed solely for the purpose of manufacturing beer therein, and could be adapted to no other purpose; that the value of said buildings on the 1st day of January, 1880, and during all of said year, was of the sum of $45,000.00, and said buildings are now and have been since the year 1880 worth and of the value of $45,000.00, provided they are allowed to make, manufacture, and brew beer therein; but if they are prohibited and enjoined from using said buildings for making, manufacturing, and brewing beer the same would not be worth to exceed $3,000 to $5,000; that the machinery and appliances in said buildings on the 1st of January, 1880, were worth the sum of $——, and that said machinery and appliances are now and have been ever since the 1st of January, 1880, worth and are of the value of $9,175.00, provided the said defendants are allowed to use the same for the purpose for which they were bought, to wit, the making, manufacturing, and brewing of beer; but that if said
34 Ziebold & Hagelin should be enjoined and restrained from using said machinery and appliances they would not be worth to exceed $1,000. Affiant further states that they have no other business or occupation other than that of making, brewing, and manufacturing beer; that they have spent 15 years in putting up said buildings and building up their trade and learning their business, and that they have no other means of support other than that derived from said brewery; that if they are not permitted to carry on their said business it will result in their total ruin and bankruptcy, and will prevent them from supporting their families, who rely upon them entirely for support.

HERMAN ZIBOLD.

Subscribed and sworn to before me this the 1st day of October, 1886.

[SEAL.] HUGH G. MACAULAY,
Notary Public.

My commission expires May 13, 1888.

STATE OF KANSAS, } ss:
Atchison County, }

Joseph Hagelin, being first duly sworn, upon oath states that he is one of the defendants in the above case; that he has read and knows the contents of the foregoing affidavit of Herman Ziebold, and that it is true.

JOSEPH HAGELIN.

Subscribed in my presence and sworn to before me this 1st day of October, A. D. 1886.

[SEAL.] HUGH G. MACAULAY,
Notary Public.

Commission expires May 13th, 1888.

35 Endorsed: No. 5677. State of Kansas *ex rel. vs.* Ziebold & Hagelin. Affidavit of Herman Ziebold. Filed Oct. 28, 1886. A. S. Thomas, clerk.

36 *Affidavit.*

STATE OF KANSAS, } ss:
Atchison County, }

In the Circuit Court of the United States, District of Kansas.

THE STATE OF KANSAS on the Relation of J. F. TUFTS, Assistant Attorney General of the State of Kansas for Atchison County, Kansas, Plaintiff,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold & Hagelin, Defendants.

Julius Kuhn, being first duly sworn, upon oath attests that he is 55 years old. My name is Julius Kuhn. I reside in Atchison, Kansas. I have known Herman Ziebold and Joseph Hagelin, the defendants in the above case, since 1870. I know and am acquainted with the location of their brewery, being the same property in question, adjoining the city of Atchison, Atchison county, Kansas. I have been familiar with and known its location since 1863. All of the present buildings on said property, with the exception of one cellar, which has been repaired, were constructed prior to the first of January, 1880, and prior to the first of January, 1880, said defendants had a large amount of machinery in said buildings which were used for the sole purpose of making and manufacturing beer. Said brewery buildings, which have been used by said Ziebold and Hagelin for manufacturing beer, were, on the first day of January, 1880, and prior thereto, worth the sum of from $40,000 to $45,000 *dollars*, and said property and buildings are still worth said sum, provided the same can be used for the purpose of brewing and manufacturing beer, but said buildings would be of little value for any other business other than that of making and
37 manufacturing beer therein, owing to its peculiar construction and location of its cellars. It is well adapted to the

purpose of making and manufacturing beer. The machinery in said buildings, on the first of January, 1880, and prior thereto, was worth and was of the value of at least $7,000 to $10,000. Said machinery and appliances would be greatly damaged and of little value if the same had to be removed from the brick, stone, and masonry in which they *and* embedded and surrounded. Affiant is engaged in business as a wholesale grocery dealer, and is acquainted with and knows the value of property in this city and vicinity.

JULIUS KUHN.

Subscribed and sworn to before me this the 1st day of October, 1886.

[SEAL.] HUGH G. MACAULAY,
Notary Public.

My commission expires May 13, 1888.

Endorsed: No. 5677. State *vs.* Ziebold & Hagelin. Affidavit of Julius Kuhn. Filed Oct. 28, 1886. A. S. Thomas, clerk.

38 *Affidavit.*

STATE OF KANSAS, } ss:
Atchison County, }

In the Circuit Court of the United States, District of Kansas.

THE STATE OF KANSAS on the Relation of J. F. TUFTS, Assistant Attorney General of the State of Kansas for Atchison County, Kansas, Plaintiff,

vs.

HERMAN ZIEBOLD & JOSEPH HAGELIN, Partners as Ziebold & Hagelin, Defendants.

Albert Weinman, being first duly sworn, upon oath states that he is 55 years old. My name is Albert Weinman. I reside in Atchison, Kansas. I have known Herman Ziebold and Joseph Hagelin, the defendants in the above case, since 1870. I know and am acquainted with the location of their brewery, being the same property in question, adjoining the city of Atchison, Atchison county, Kansas. I have been familiar with and known its location since 1860. I assisted in the building of the brewery five days in 1860; first two was made in November, 1860. All of the present buildings on said property, with the exception of one cellar, which has been repaired, were constructed prior to the first of January, 1880, and prior to the first of January, 1880, said defendants had a large amount of machinery in said buildings, which was used for the sole purpose of making and manufacturing beer. Said brewery buildings, which have been used by said Ziebold & Hagelin for manufacturing beer, were, on the first day of January, 1880, and prior thereto, worth the sum of from $40,000 to $45,000 *dollars*, and said buildings and property are still worth said sum, provided the
39 same can be used for the purpose of brewing and manufacturing beer, but said buildings would be of little value for

any other business, and would not be worth to exceed the sum of $3,000 for any other business other than that of making and manufacturing beer therein, owing — the peculiar construction and location of its cellars. It is well adapted to the purpose of making and manufacturing beer. The machinery & appliances in said buildings, on the first of January, 1880, and prior thereto, was worth and was of the value of at least $10,000 *dollars*. Said machinery and appliances would be greatly damaged and of little value if the same had to be removed from the brick, stone, and masonry in which they are embedded and surrounded. Affiant is engaged in business as proprietor of a cooper factory, and is acquainted with and knows the value of property in this city and vicinity. I have lived ever since 1861 within (2) two hundred yards of said brewery.

ALBERT WEINMAN.

Subscribed and sworn to before me this 1st day of October, 1886.
[SEAL.] HUGH G. MACAULAY,
Notary Public.

My commission expires May 13th, 1888.

Endorsed: No. 5677. State *vs.* Ziebold & Hagelin. Affidavit Filed Oct. 28, 1886. A. S. Thomas, clerk.

40 *Affidavit.*

STATE OF KANSAS, *Atchison County,* } *ss:*

In the Circuit Court of the United States, District of Kansas.

THE STATE OF KANSAS on the Relation of J. F. TUFTS, Assistant Attorney General of the State of Kansas for Atchison County, Kansas, Plaintiff,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold & Hagelin, Defendants.

Alfred Meier, being first duly sworn, upon oath attests that he is 36 years old. My name is Alfred Meier. I reside in Atchison, Kansas. I have known Herman Ziebold and Joseph Hagelin, the defendants in the above case, since 1872. I know and am acquainted with the location of their brewery, being the same property in question, adjoining the city of Atchison, Atchison county, Kansas. I I have been familiar with and known its location since 1872. All of the present buildings on said property, with the exception of one cellar, which has been repaired, were constructed prior to the first of January, 1880, and prior to the first of January, 1880, said defendants had a large amount of machinery in said buildings, which were used for the sole purpose of making and manufacturing beer. Said brewery buildings, which have been used by said Ziebold and Hagelin for manufacturing beer, were, on the first day of January, 1880, and prior thereto, worth the sum of $40,000 *dollars*, and said

property and buildings are still worth said sum, provided the same can be used for the purpose of brewing and manufacturing beer, but said buildings would be of little value for any other business, and would not be worth to exceed the sum of from $4,000 to $5,000 *dollars*
41 for any other business other than that of making and manufacturing beer therein, owing to its peculiar construction and location of its cellars. It is well adapted to the purpose of making and manufacturing beer. The machinery and appliances in said buildings, on the first of January, 1880, and prior thereto, was worth and was of the value of at least $10,000. Said machinery and appliances would be greatly damaged and of little value if the same had to be removed from the brick, stone, and masonry in which they *and* embedded and surrounded. Affiant is engaged in business as an architect, and is acquainted with and knows the value of property in this city and vicinity. I made the plans and superintended the construction of certain cellars and additions to said buildings during and prior to the year 1879 of the cost & value of $18,000.

ALFRED MEIER.

Subscribed and sworn to before me this the 1st day of October, 1886.

[SEAL.] HUGH G. MACAULAY,
Notary Public.

My commission expires May 13th, 1888.

Endorsed: No. 5677. State *vs.* Ziebold & Hagelin. Affidavit. Filed Oct. 28, 1886. A. S. Thomas, clerk.

42 *Affidavit.*

STATE OF KANSAS, }
Atchison County, } *ss:*

In the Circuit Court of the United States, District of Kansas.

THE STATE OF KANSAS on the Relation of J. F. TUFTS, Assistant Attorney General of the State of Kansas for Atchison County, Kansas, Plaintiff,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold & Hagelin, Defendants.

George Ostertag, being first duly sworn, upon oath states that he is 50 years old. My name is George Ostertag. I reside in Atchison Kansas. I have known Herman Ziebold and Joseph Hagelin, the defendants in the above case, since 1866. I know and am acquainted with the location of their brewery, being the same property in question, adjoining the city of Atchison, Atchison county, Kansas. I have been familiar with and known its location since 1862; it was built about the year 1862. All of the present buildings on said property, with the exception of one cellar, which has been repaired, were constructed prior to the first of January, 1880, and prior to the first

of January, 1880, said defendants had a large amount of machinery in said buildings, which were used for the purpose of making and manufacturing beer. Said brewery buildings, which have been used by said Ziebold and Hagelin, were, on the first day of January, 1880, and prior thereto, worth the sum of $43,000 to $45,000 *dollars*, and said buildings and property are still worth said sum, provided the same can be used for the purpose of brewing and manufacturing beer, but said buildings would be of little value for any
43 other business, and would not be worth to exceed the sum of $2,000 to 2,500 dollars for any other business other than that of making and manufacturing beer therein, owing to the peculiar construction of said building and location of its cellars. It is well adapted to the purpose of making and manufacturing beer. The machinery and appliances in said buildings, on the first of January, 1880, and prior thereto, was worth and was of the value of at least $9,000 to $10,000 *dollars*. Said machinery and appliances would be greatly damaged and of little value if the same had to be removed from the brick, stone, and masonry in which they are embedded and surrounded. Affiant is engaged in business as a wagon manufacturer, and is acquainted with and knows the value of property in this city and vicinity.

GEORGE OSTERTAG.

Subscribed and sworn to before me this the 29th day of September, 1886.

[SEAL.] HUGH MACAULAY,
Notary Public.

My commission expires May 13th, 1888.

Endorsed: No. 5677. State *vs.* Ziebold & Hagelin. Filed Oct. 28, 1886. A. S. Thomas, clerk.

44 *Affidavit.*

STATE OF KANSAS, } *ss:*
Atchison County, }

In the Circuit Court of the United States, District of Kansas.

THE STATE OF KANSAS on the Relation of J. F. TUFTS, Assistant Attorney General of the State of Kansas for Atchison County, Kansas, Plaintiff,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold & Hagelin, Defendants.

Henry Luth, being first duly sworn, upon oath states that he is 58 years old. My name is Henry Luth. I reside in Atchison, Kansas. I have known Herman Ziebold and Joseph Hagelin, the defendants in the above case, since 1871. I know and am acquainted with the location of their brewery, being the same property in question, adjoining the city of Atchison, Atchison county, Kansas. I have been

familiar with and known its location since 1861. I done all the carpenter work on said buildings since Ziebold & Hagelin owned brewery, in 1871. All of the present buildings on said property, with the exception of one cellar, which has been repaired, were constructed prior to the first of January, 1880, and prior to the first of January, 1880, said defendants had a large amount of machinery in said buildings, which were used for the purpose of making and manufacturing beer. Said brewery buildings, which have been used by said Ziebold and Hagelin, were, on the first day of January, 1880, and prior thereto, worth the sum of about $45,000 *dollars*, and said buildings and property are still worth said sum, provided the same can be used for the purpose of brewing and manufacturing beer, but said buildings would be of little value for any other business, and would not be worth the said sum of $2,500 *dollars* for any other business other than that of making and manufacturing beer therein, owing to the peculiar construction and location of its cellars. It is well adapted for the purpose of making and manufacturing beer. The machinery in said buildings, on the first of January, 1880, and prior thereto, was worth and was of the value of at least $10,000 *dollars*. Said machinery and appliances would be greatly damaged and of little value if the same had to be removed from the brick, stone, and masonry in which they are embedded and surrounded. Affiant is engaged in business as a carpenter, and is acquainted with and knows the value of property in this city and vicinity.

HENRY LUTH.

Subscribed and sworn to before me this 1st day of October, 1886.
[SEAL.] HUGH G. MACAULAY,
Notary Public.

My commission expires May 13, 1888.

Endorsed: No. 5677. State *vs.* Ziebold & Hagelin. Affidavit of ——. Filed Oct. 28, 1886. A. S. Thomas, clerk.

Affidavit.

STATE OF KANSAS, *Atchison County,* } *ss:*

In the Circuit Court of the United States, District of Kansas.

THE STATE OF KANSAS on the Relation of J. F. TUFTS, Assistant Attorney General of the State of Kansas, for Atchison County, Kansas, Plaintiff,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold & Hagelin, Defendants.

Joseph Cook, being first duly sworn, upon oath states that he is 60 years old. My name is Joseph Cook. I reside in Atchison, Kansas. I have known Herman Ziebold and Joseph Hagelin, the defendants in the above case, since 1870. I know and am acquainted with the location of their brewery, being the same property in ques-

tion, adjoining the city of Atchison, Atchison county, Kansas. I have been familiar with and known its location since 1860. I assisted as a stone-mason in putting up part of additions to buildings in 1860. All of the present buildings on said property, with the exception of one cellar, which has been repaired, were constructed prior to the first of January, 1880, and prior to the first of January, 1880, said defendants had a large amount of machinery in said buildings which was used for the purpose of making and manufacturing beer. Said brewery buildings which have been used by said Ziebold & Hagelin for manufacturing beer were on the first day of January, 1880, and prior thereto, worth the sum of between $40,000 & $45,000 *dollars*, and said buildings and property are still worth said sum, provided the same can be used for the purpose of
47 brewing and manufacturing beer, but said buildings would be of little value for any other business and would not be worth to exceed the sum of $2,500 for any other business other than that of making and manufacturing beer therein, owing to the peculiar construction and location of its cellars. It is well adapted to the purpose of making and manufacturing beer. The machinery and appliances in said buildings on the first of January, 1880, and prior thereto, was worth and was of the value of at least $8,000 *dollars*. Said machinery and appliances would be greatly damaged and of little value if the same had to be removed from the brick, stone, and masonry in which they are imbedded and surrounded. Affiant is engaged in business as a stone-mason, and is acquainted with and knows the value of property in this city and vicinity.

JOSEPH COOK.

Subscribed and sworn to before me this the 1st day of October, 1886.

[SEAL.] HUGH G. MACAULAY,
Notary Public.

My commission expires May 13th, 1888.

Endorsed: No. 5677. State *vs.* Ziebold & Hagelin. Affidavit of ——. Filed Oct. 28, 1886. A. S. Thomas, clerk.

48 *Affidavit.*

STATE OF KANSAS, } ss:
Atchison County, }

In the Circuit Court of the United States, District of Kansas.

The STATE OF KANSAS on the Relation of J. F. TUFTS, Assistant Attorney General of the State of Kansas, for Atchison County, Kansas, Plaintiff,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold & Hagelin, Defendants.

Albert Dilgert, being first duly sworn, upon oath states that he is 46 years old. My name is Adam Dilgert. I reside in Atchison,

Kansas. I have known Herman Ziebold and Joseph Hagelin, the defendants in the above case, since 1870. I know and am acquainted with the location of their brewery, being the same property in question, adjoining the city of Atchison, Atchison county, Kansas. I have been familiar with and known its location since 1866. I done the stone-work on one cellar in 1873, another cellar in 1875, and next addition to building in 1879. All of the present buildings on said property, with the exception of one cellar, which has been repaired, were constructed prior to the first of January, 1880, and prior to the first of January, 1880, said defendants had a large amount of machinery in said buildings which was used for the sole purpose of making and manufacturing beer. Said brewery buildings, which have been used by said Ziebold & Hagelin for manufacturing beer, were on the first day of January, 1880, and prior thereto, worth the sum of about $45,000 *dollars*, and said buildings and property are still worth
49 said sum, provided the same can be used for the purpose of brewing and manufacturing beer, but said buildings would be of little value for any other business, and would not be worth to exceed the sum of from $2,000 to $2,500 for any other business other than that of making and manufacturing beer therein, owing — the peculiar construction and location of its cellars. It is well adapted to the purpose of making and manufacturing beer. The machinery & appliances in said buildings on the first of January, 1880, and prior thereto, was worth and was of the value of at least about $10,000 *dollars*. Said machinery and appliances would be greatly damaged and of little value if the same had to be removed from the brick, stone, and masonry in which they are embedded and surrounded. Affiant is engaged in business as a contractor for stone-work and is acquainted with and knows the value of property in this city and vicinity.

ADAM DILGERT.

Subscribed and sworn to before me this the 1st day of October, 1886.

[SEAL.] HUGH G. MACAULAY,
Notary Public.

My commission expires May 13th, 1888.

Endorsed: No. 5677. State *vs.* Ziebold & Hagelin. Affidavit of Adam Dilgert. Filed Oct. 28, 1886. A. S. Thomas, clerk.

50 *Affidavit.*

STATE OF KANSAS, } ss:
Atchison County, }

In the Circuit Court of the United States, District of Kansas.

THE STATE OF KANSAS on the Relation of J. F. TUFTS, Assistant Attorney General of the State of Kansas for Atchison County, Kansas, Plaintiff,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold & Hagelin, Defendants.

Theodore Frank, being first duly sworn, upon oath states that he is 55 years old. My name is T. Frank. I reside in Atchison, Kansas. I have known Herman Ziebold and Joseph Hagelin, the defendants in the above case, since 1868. I know and am acquainted with the location of their brewery, being the same property in question, adjoining the city of Atchison, Atchison county, Kansas. I have been familiar with and known its location since 1861. All of the present buildings on said property, with the exception of one cellar, which has been repaired, were constructed prior to the first of January, 1880, and prior to the first of January, 1880, said defendants had a large amount of machinery in said buildings which were used for the purpose of making and manufacturing beer. Said brewery buildings, which have been used by said Ziebold and Hagelin for manufacturing beer, were on the first day of January, 1880, and prior thereto, worth the sum of from $40,000 to $45,000 *dollars*, and said property and buildings are still worth said sum, provided the same can be used for the purpose
51 of brewing and manufacturing beer, but said buildings would be of little value for any other business, and would not be worth to exceed the sum of $2,500 to $3,000 for any other business other than that of making and manufacturing beer therein, owing to its peculiar construction and location of its cellars. It is well adapted to the purpose of making and manufacturing beer. The machinery and appliances in said buildings on the first of January, 1880, and prior thereto, was worth and was of the value of at least $8,000 to $10,000. Said machinery and appliances would be greatly damaged and of little value if the same had to be removed from the brick, stone, and masonry in which they are imbedded and surrounded. Affiant is engaged in business as a grocery merchant, and is acquainted with and knows the value of property in this city and vicinity.

THEO. A. FRANKE.

Subscribed and sworn to before me this 1st day of October, 1886.

[SEAL.] HUGH G. MACAULAY,
Notary Public.

My commission expires May 13, 1888.

Endorsed: No. 5677. State *vs.* Ziebold & Hagelin. Affidavit of Theodore Frank. Filed Oct. 28, 1886. A. S. Thomas, clerk.

52 In the Circuit Court of the United States for the District of Kansas.

STATE OF KANSAS *ex rel.*

vs.

HERMAN ZIEBOLD and JOS. HAGELIN.

The plea in abatement to the petition for removal is hereby overruled, and it is ordered that this case be retained in this court for further proceedings.

October 25th, 1886.

DAVID J. BREWER,
Circuit Judge.

Endorsed: No. 5677. State of Kansas *ex rel. vs.* Herman Ziebold & Jos. Hagelin. Order overruling plea in abatement to the petition for removal & case retained for further proceedings. Filed Oct. 25, 1886. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

53 *Bill of Complaint.*

In the Circuit Court of the United States for the District of Kansas.

THE STATE OF KANSAS *ex rel.* J. F. TUFTS, Assistant Attorney General of the State of Kansas for Atchison County, Complainant,

vs.

HERMAN ZIEBOLD & JOSEPH HAGELIN, Partners as Ziebold & Hagelin, Defendants.

To the judges of the circuit court for the district of Kansas:

J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, duly appointed and qualified as such under the provisions of chapter 149 of the session laws of the State of Kansas for the year 1885, and who sues for and on behalf of the State of Kansas in this behalf, pursuant to an order of this court to recast the pleadings in this cause removed on petition of the defendants to this court, brings now his amended and recast bill for and on behalf of the State of Kansas against Herman Ziebold and Joseph Hagelin, partners in business as Ziebold & Hagelin, both of whom are residents of the city of Atchison, Kansas, and residents of the State of Kansas.

And thereupon said J. F. Tufts, assistant attorney general for Atchison county, Kansas, who sue*ing* for and on behalf of the State of Kansas, comes now and gives the court to understand and be informed that a certain group of buildings composed of wood,

54 stone, and brick, and known as "the brewery," situated upon a part of the southeast quarter, ¼, and a small adjoining part of the southwest quarter, ¼, of section one, 1, township six, 6, of range twenty, 20, in Atchison county, Kansas, and owned and controlled by the said defendants Zeibold and Hagelin, is a place where spirituous, vinous, and other intoxicating liquors are, and have been for several months last past, bartered, sold, and given away, and where such intoxicating liquors are kept for barter, sale, and gift in viola-

tion of law, and where such intoxicating liquors are manufactured for barter, sale, and gift in the State of Kansas in violation of law; that by the laws of the State of Kansas, to wit, by an act entitled "An act to prohibit the manufacture and sale of intoxicating liquors except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes," approved February 10th, 1881, the same being chapter 128 of the session laws of 1881 of the State of Kansas, a copy of which said act is hereto appended and attached, marked Exhibit "A" and made a part of this bill, and an act entitled "An act amendatory and supplemental to chapter 128 of the session laws of 1881," being an act entitled "An act to prohibit the manufacture and sale of intoxicating liquors except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes," approved March 7th, 1885, the same being chapter 149 of the session laws of 1885 of the State of Kansas, a copy of which said act is hereto appended and attached, marked "Exhibit A," and made a part of this bill, all places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of law, or where intoxicating liquors are kept for sale, barter, or delivery in violation of law, are declared to be common nuisances.

That the said place, in consequence thereof, is a common nuisance to the people of the State of Kansas, and especially to the people of the city and county of Atchison, in said State.

That the said defendants, Herman Ziebold and Joseph Hagelin, partners as Ziebold & Hagelin, are the keepers of said place, and maintain and operate said place as a place where spirituous, vinous, fermented, malt, and other intoxicating liquors are sold, bartered, and given away, and are kept for sale, barter, and gift, and are manufactured for barter, sale, and gift in the State of Kansas.

That the said defendants have no permit granted or issued by the probate judge of Atchison county, Kansas, authorizing the said defendants or either of them to sell, barter, or give away, or keep for barter, sale, or gift, any intoxicating liquors, or to manufacture intoxicating liquors for any purposes.

That the said defendants are the owners of the premises above described, and have full knowledge of the purpose for which said place is being used, and know that the said premises are being used as a place where intoxicating liquors are sold, bartered, and given away, and are kept for barter, sale, and gift, and are manufactured for barter, sale, and gift in the State of Kansas, and that the defendants and each of them have no permit, issued according to law, by the probate judge of Atchison county, Kansas, and knowing the fact the defendants conduct and carry on the said illegal business therein, and maintain the common nuisance; that the said place, in consequence thereof, is a common nuisance to the people of the State of Kansas and of great injury to the public, which injury is irreparable and cannot be compensated in damages.

That by the laws of the State of Kansas, herein before referred to and made a part of this bill, as by reference thereto now made

56 will appear, a perpetual injunction against the continuance of such nuisance is authorized to issue under the usual forms and penalties of equity, and by the said laws of the State of Kansas a temporary injunction is authorized to issue upon the commencement of the suit, and it is specially provided that, upon the commencement of such suit brought in the name of the State for an injunction to prevent the further continuance and maintenance of any such nuisance, no bond shall be required of the complainant.

That all the rights, interests, estate, and title in and to said premises vested in said defendants were acquired with full knowledge that all places where intoxicating liquors were sold in violation of law were, by the statutes of the State of Kansas, to wit, an act entitled "An act to restrain dram-shops and taverns and to regulate the sale of intoxicating liquors," approved March, 1868, a copy of — act is hereto attached, marked Exhibit "C," and made a part of this bill, declared to be a common nuisance and directed to be shut up and abated as public nuisances; and at the time said defendants erected the buildings and appurtenances on the premises herein described, and at the time said defendants acquired their present rights, interest, estate, and title to said premises, the sale, barter, and giving away of spirituous, vinous, fermented, and other intoxicating liquors without first taking out and having a license or permit was prohibited by the law of said State, punished by fine and imprisonment, and all places where such liquors were sold, bartered, or given away in violation of law were declared to be common nuisances and directed to be shut up and abated as such.

That none of the malt, vinous, spirituous, fermented, or other intoxicating liquors now in possession of said defendants on said premises, the barter, sale, or gift of which in violation of
57 the laws of the State of Kansas is sought to be enjoined in this action, was in existence prior to the adoption of the constitutional amendment prohibiting the manufacture and sale of intoxicating liquors except for medical, scientific, and mechanical purposes, and the enactment of said acts by the Legislature of the State of Kansas.

And your complainant avers that the granting and allowing of the perpetual injunction prayed for in this bill, and the granting of any other and further relief prayed for herein, will not destroy the value of the premises described, and that the value of said premises will not be lost to said defendants by reason hereof; that the same can be readily adapted to other purposes than the sale and keeping for sale of beer and the manufacturing of the same for sale, barter, and gift in the State of Kansas; that the same will be valuable for such other purposes, as well as for the purposes of selling and keeping for sale of beer and the manufacturing of the same for sale, barter, and gift in the State of Kansas; that said defendants are not restricted by reason of this proceeding, and it is not sought by this proceeding to restrict them, from the free exercise, control, enjoyment, and use of said premises for any lawful purpose or for any purpose whatever except the barter, sale, or gift, the keeping for

barter, sale, or gift, of intoxicating liquors, and the manufacture of the same for barter, sale, and gift in the State of Kansas in violation of law.

To the end, therefore, that the said defendants may, if they can, show why your complainant should not have the relief hereby prayed, your complainant prays that the said defendants may be required, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct,
58 and perfect answer make to each and several of the allegations and averments herein contained as fully and completely as though specially interrogated thereunto.

And that the premises, to wit, a certain group of buildings composed of wood, stone, and brick, and known as "the brewery," situated upon a part of the southeast quarter and a small adjoining part of the southwest quarter of section one (1), township six (6), of range twenty (20), in Atchison county, Kansas, and owned by defendants Ziebold and Hagelin, may be adjudged to be a common nuisance, and that an order may issue directing the sheriff or other proper officer to shut up and abate said place.

That the defendants and each of them may be perpetually enjoined from using, or permitting to be used, the said premises as a place where intoxicating liquors are sold, bartered, or given away or are kept for barter, sale, or gift otherwise than by authority of law.

That in the meantime the said defendants may be enjoined until the further order of the court from keeping open, or permitting to be open, the said certain group of buildings composed of wood, stone, and brick, known as "the brewery," situated upon a part of the southeast quarter and a small adjoining part of the southwest quarter of section one (1), township six (6), of range twenty (20), in Atchison county, Kansas, and owned by defendants Ziebold and Hagelin, and from selling, bartering, or giving away, and from keeping for sale, barter, or gift or use in or about said premises, or manufacture for barter, sale, or gift in the State of Kansas, any malt, vinous, spirituous, fermented, or other intoxicating liquors, and from permitting such liquors to be sold, bartered, or given away, or to be kept for sale, barter, or use, at, in, or about said premises, or manufactured for barter, sale, or gift in the State of Kansas.

And said J. F. Tufts, as such assistant attorney general of
59 the State of Kansas for Atchison county, for and on behalf of the State of Kansas, prays that such other and further relief may be given as may be warranted at law and the exigencies of the case may require.

Therefore, will your honors grant unto your complainant the writ of subpœna issuing out of and under the seal of this court, to be directed to said defendants, Herman Ziebold and Joseph Hagelin, commanding them and each of them by a certain day and under a certain penalty therein inserted, to appear before your honors in the circuit court of the United States for the district of Kansas, and then

and there answer the premises and abide the order and decree of the court.

J. F. TUFTS,
Assistant Attorney General, Attorney for Plaintiff.

S. B. BRADFORD &
A. E. AUSTIN,
Of Counsel.

STATE OF KANSAS, }
Atchison County, } ss:

J. F. Tufts, of lawful age, and being by me first duly sworn, deposeth and says that he is assistant attorney general of the State of Kansas for Atchison county; that he has read and heard read the above and foregoing bill, and knows the facts and statements therein set forth and representations therein made to be true in fact and substance.

J. F. TUFTS.

Subscribed and sworn to before me this 4th day of February, 1887.
[SEAL.] JAMES W. ORR,
Notary Public.

My commission expires January 8, 1889.

60 EXHIBIT "A."

An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Any person or persons who shall manufacture, sell, or barter any spirituous, malt, vinous, fermented, or other intoxicating liquors shall be guilty of a misdemeanor and punished as hereinafter provided: Provided, however, That such liquors may be sold for medical, scientific, and mechanical purposes, as provided in this act.

SEC. 2. It shall be unlawful for any person or persons to sell or barter for medical, scientific, or mechanical purposes any malt, vinous, spirituous, fermented, or other intoxicating liquors without first having procured a druggist's permit therefor from the probate judge of the county wherein such druggist may at the time be doing business, and such probate judge is hereby authorized, in his discretion, to grant a druggist's permit, for the period of one year, to any person of good moral character who is lawfully and in good faith engaged in the business of a druggist in his county, and who, in his judgment, can be intrusted with the responsibility of selling said liquors for the purposes aforesaid in the manner hereinafter provided. In order to obtain a druggist's permit under this act the applicant therefor shall present to the probate judge of the county wherein such person is engaged in business a petition, signed by at least twelve citizens of the township or city wherein such business

is located, certifying that the applicant is a person of good moral character and lawfully engaged in the business of a
61 druggist. He shall also file with such petition a good and sufficient bond to the State of Kansas in the sum of twenty-five hundred dollars, conditioned that such applicant will neither use, sell, barter, nor give away any of the liquors mentioned in section one of this act in violation of any of the provisions of this act, and on such violation said bond shall thereby become forfeited. Such bond must be signed by the applicant and by at least two of the persons signing such petition as sureties, and such sureties must jointly or severally justify, in writing under oath, in the sum of five thousand dollars over and above all their debts, legal exemptions, and liabilities: Provided, That in cities, towns, and places of less than five thousand population said bond may be in the sum of one thousand dollars, and the sureties shall justify, as provided above, in the sum of two thousand dollars. The probate judge shall consider such petition and bond, and if satisfied that the petition is true and that the bond is sufficient under this act may, in his discretion, grant a permit to the applicant to sell intoxicating liquors for medical, scientific, and mechanical purposes only, and thereupon, before delivering said permit, and before it shall be of any validity, the probate judge shall record upon the journal of this court the said permit, together with his order granting the same, and the bond filed therewith and justification thereon, which said permit shall be posted in a conspicuous place in the store where such business is carried on. The probate judge shall receive for said services the sum of five dollars, to be paid by the applicant.

SEC. 3. Any physician who is regularly engaged in the practice of his profession as a business, and who, in cases of actual sickness, shall deem any of the liquors mentioned in the first section of this act necessary for the health of his patient, may give such
62 patient a written or printed prescription therefor; but no such prescription shall be made or given except in case of actual sickness, and when, in the judgment of such physician, the use of intoxicating liquor is necessary as a remedy. Whenever, in the treatment of a minor, it shall be necessary to use intoxicating liquor as a remedy the same shall be procured by his parent or guardian, or some other person of full age, to whom such physician may deliver a prescription for that purpose. Every physician, before making any prescription for intoxicating liquors, shall make and file with the probate judge of the county wherein he may practice his profession an affidavit before some officer of the county authorized to administer oaths in substance as follows:

STATE OF KANSAS, }
County of ——, } ss:

I, A. B., do solemnly swear that I am a practicing physician of the State of Kansas residing in the county of —, in said State, and I do further solemnly swear that I will not prescribe intoxicating liquors of any kind for any person or persons whomsoever unless in case of actual sickness and when the same is necessary for the health

of the patient, and that I will in all things faithfully keep, observe, and perform all the requirements and conditions of the laws of Kansas regulating the sale and use of intoxicating liquors. So help me God.

(Signed) ——— ———.

Sworn to before me and subscribed in my presence this — day of ———, A. D. 18—.

——— ———.

And such affidavit shall be renewed and filed at the expiration of each five years of said physician's practice. Every physician, or person assuming to act as such, who shall make a prescription for any intoxicating liquors without having made and filed the affidavit in this section provided, or who shall, after making and filing such affidavit, violate any of the provisions of this act, shall be
63 deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars, and for any second or subsequent offence shall upon conviction be subject to the same fine, and in addition thereto shall be imprisoned in the county jail not less than thirty days nor more than six months. No druggist shall sell upon or fill any prescription for intoxicating liquors until the physician making the same shall have made and filed the affidavit in this section provided, and shall not continue such sales for more than five years after such affidavit is filed, unless a new affidavit is filed, as required by this section. The probate judge shall forthwith deliver to each licensed druggist in his county a certificate of the filing of each physician's affidavit required by this act.

SEC. 4. Any druggist having a permit to sell intoxicating liquors under the provisions of this act may sell for medical purposes only upon the written or printed prescription of a practicing physician, duly signed by such physician, and who has made and filed the affidavit mentioned in the preceding section, and for scientific and mechanical purposes only upon a written or printed application, which shall be dated and shall set forth the name of the applicant, his residence and occupation, the quantity and kind of liquor required, and the purpose for which it is required, and shall have appended thereto an affidavit by the applicant, made before some officer authorized to administer oaths in his county, that the statements contained in such application are true, and all such applications shall be retained by the druggist selling thereon, and at the end of every thirty days, or sooner, shall be by him filed in the probate court out of which his permit issued, where — shall be safely kept for the period of two years from the date of the filing of each. Every person willfully taking a false oath in making
64 any such application shall be guilty of perjury, and upon conviction therefor in any court having jurisdiction shall be punished as provided by law for perjury in other cases: Provided, however, That no sales of intoxicating liquors shall be made by any such druggist knowingly to any minor in any case except upon prescription for medical purposes as in this act provided. The said

druggist shall file away and keep all prescriptions for intoxicating liquors and prescriptions partly for intoxicating liquors by him filled, and shall also keep a book in which he shall make a record of all sales of intoxicating liquors by him made, which record shall show the names and residences of all purchasers of such liquors, the kind and quantity sold, the purpose for which sold, the dates of such sales, the prices received, and if upon prescription the name of the physician making the same. The record so kept shall be open to the inspection of the public at all reasonable time during business hours: Provided, That any druggist having a permit to sell intoxicating liquors under this act may sell such liquors in quantities not less than one gallon to any other druggist having a like permit.

SEC. 5. No person shall manufacture or assist in the manufacture of intoxicating liquors in this State except for medical, scientific, and mechanical purposes. Any person or persons desiring to manufacture any of the liquors mentioned in section one of this act for medical, scientific, and mechanical purposes shall present to the probate judge of the county wherein such business is proposed to be carried on a petition asking a permit for such purpose, setting forth the name of the applicant, the place where it is desired to carry on such business, and the kind of liquor to be manufactured. Such petition shall have appended thereto a certificate signed by at least twelve citizens of the township or
65 city where such business is sought to be established certifying that such applicant is a person of good moral character, temperate in his habits, and a proper person to manufacture and sell intoxicating liquors. Such applicant shall file with said petition a bond to the State of Kansas in the sum of ten thousand dollars, conditioned that for any violation of the provisions of this act said bond shall be forfeited. Such bond shall be signed by said applicant or applicants as principal or principals and by at least three sureties, who shall justify under oath in the sum of seven thousand dollars each, and who shall be of the number signing said petition. The probate judge shall consider such petition and bond, and, if satisfied that such petition is true and that the bond is sufficient, may, in his discretion, grant a permit to manufacture intoxicating liquors for medical, scientific, and mechanical purposes. The said permit, the order granting the same, and the bond and justification thereon shall be forthwith recorded by said probate judge in the same manner and with like effect as in case of a permit to sell such liquors as provided in section two of this act; and the probate judge shall be entitled to the same fee for his services, to be paid by the applicant. Such manufacturer shall keep a book wherein shall be entered a complete record of the liquors manufactured by him, the sales made, with the dates thereof, the name and residence of the purchaser, the kind and quantity of liquors sold, and the price received or charged therefor. An abstract of such record, verified by the affidavit of the manufacturer, shall be filed quarterly in said probate court at the end of each quarter during the period covered by such permit. Such manufacturer shall sell

the liquor so manufactured only for medical, scientific, and mechanical purposes, and only in original packages. He shall not sell said liquors for medical purposes except to druggists, who at the
66 time of such sale shall be duly authorized to sell intoxicating liquors as provided in this act; and he shall sell such liquors to no other person or persons, associations or corporations, except for scientific and mechanical purposes, and then only in quantities not less than five gallons.

SEC. 6. All sales made by such manufacturer shall be upon a written or printed application, setting forth the name, occupation, and residence of the applicant, the quantity and kind of liquors wanted, and for what purpose, and all such applications shall be verified by the affidavit of the applicant, made before some officers in the county having authority to administer oaths, that the statements in said application are true. Such manufacturer shall file all such applications in the probate court of the county wherein the applicant resides within thirty days after receiving the same, where they shall be kept on file for two years from the date of such filing. Every person who shall wilfully swear falsely in making any of the affidavits in this section and in section five of this act provided shall be deemed guilty of perjury, and shall be prosecuted and punished therefor as in other cases arising under the laws of this State relating to perjury. Any rectification or adulteration of intoxicating liquors shall be considered manufacturing under this act. The record kept by such manufacturer shall be open to the inspection of the public at all reasonable times during business hours.

SEC. 7. Any person, without taking out and having a permit to sell intoxicating liquors as provided in this act, who shall, directly or indirectly, sell or barter any spirituous, malt, vinous, fermented, or other intoxicating liquor shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars, or
67 be imprisoned in the county jail not less than thirty days nor more than ninety days, and for a second offense shall be fined in any sum not less than two hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail not less than sixty days nor more than six months, and for a third and every subsequent offense shall be fined in a sum not less than five hundred dollars nor more than one thousand dollars, or be imprisoned in the county jail not less than three months nor more than one year, or shall suffer both such fine and imprisonment, in the discretion of the court.

SEC. 8. Any person, without taking out and having a permit to manufacture intoxicating liquors as provided in this act, who shall manufacture or aid, assist or abet, in the manufacture of any of the liquors mentioned in section one of this act shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall suffer the same punishment as provided in the last preceding section of this act for unlawfully selling such liquors.

SEC. 9. Every person having a permit to sell intoxicating liquors or to manufacture and sell intoxicating liquors under the provis-

ions of this act who shall sell or barter such liquor in any other manner or for any other purpose than in this act provided, or who shall violate any of the provisions of this act, shall, upon conviction thereof, be deemed guilty of a misdemeanor, and shall be fined in any sum not less than one hundred dollars nor more than three hundred dollars for the first offense, or be imprisoned in the county jail not less than thirty days nor more than ninety days, and in addition thereto shall forfeit his permit to sell under this act. For a second offense he shall be fined in a sum not less than three hundred dollars nor more than five hundred dollars, or shall be
68 imprisoned in the county jail not less than thirty days nor more than ninety days, and forfeit his permit, and for a period of five years his right to obtain a permit to sell intoxicating liquors under this act; and for a third and every subsequent offense he shall be fined in a sum not less than five hundred dollars nor more than one thousand dollars, or shall be imprisoned in the county jail not less than three months nor more than one year, and shall forfeit his permit and his right forever to obtain a permit to sell intoxicating liquors in this State under the provisions of this act. In all cases where forfeitures are provided in this act the court, in rendering judgment in the action, shall declare such forfeiture in fixing the punishment.

SEC. 10. Officers shall receive the same fees and mileage for serving subpœnas issued by county attorneys under the provisions of this act as provided in criminal cases, and witnesses shall receive the same fees for attendance as provided for witnesses in cases before the justices of the peace. Such fees shall be certified to the board of county commissioners by the county attorney and paid by the county as witness fees for attendance before a grand jury. All witnesses shall attend upon the county attorney in pursuance to his subpœna without the payment of any fees in advance. The county attorney shall be allowed a fee of twenty-five dollars upon each count upon which the defendant shall be convicted and the same shall be taxed as costs in the case, but the county shall in no case be liable therefor. Upon all sums collected by the county attorney on forfeited recognizances, under the provisions of this act, he shall receive 20 per cent. thereof. If any prosecution begun by the county attorney or attorney general, or by a citizen with the written consent
69 and approval of the county attorney or attorney general, under the provisions of this act shall fail, the costs of such prosecution, unless otherwise specified herein, shall be paid by the county in which such prosecution or action was begun.

SEC. 11. It shall be the duty of the county attorney to diligently prosecute any and all persons violating any of the provisions of this act in their respective counties and to bring suit upon all bonds or recognizances forfeited immediately after the happening of such forfeiture, to recover the penalty, and pay all money so collected, less his fee for collecting the same, as herein provided, into the school fund of his county. If any county attorney shall fail, neglect, or refuse to faithfully perform any duty imposed upon him by this act he shall be deemed guilty of a misdemeanor, and upon conviction

thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars and be imprisoned in the county jail not less than ten days nor more than ninety days, and such conviction shall operate as a forfeiture of his office, and the court before whom such conviction may be had shall order and adjudge such forfeiture of office in addition to the fine imposed, as herein provided. And whenever the county attorney shall be unable or shall neglect or refuse to enforce the provisions of this act in his county, or for any reason whatever the provisions of this act shall not be enforced in any county, it shall be the duty of the attorney general to enforce the same in such county, and for that purpose he may appoint as many assistants as he shall see fit, and he and his assistants shall be authorized to sign, verify, and file all such complaints, informations, petitions, and papers as the county attorney is authorized to sign, verify, or file, and to do and perform any act that the county attorney might lawfully do or perform, and for such services he shall receive the same fees that the county
70 attorney would be entitled to for like services, to be taxed and collected in the same manner.

SEC. 12. It shall be the duty of all sheriffs, under sheriffs, deputy sheriffs, constables, marshals, and police officers of cities or towns having notice or knowledge of any violation of the provisions of this act to notify the county attorney of the county of the fact of such violation, with the name of any witnesses within his knowledge by whom such violation can be proven. If any such officer shall fail in any case to comply with the provisions of this section he shall, on conviction thereof, be adjudged guilty of a misdemeanor, and fined in any sum not exceeding one hundred dollars, and such conviction shall be deemed a removal of such officer from office. If the county attorney of any county shall be notified by any officer or other person of any violation of any of the provisions of this act it shall be his duty forthwith to diligently inquire into the facts of such violation, and if there is reasonable ground for instituting a prosecution it shall be the duty of such county attorney to file a complaint in writing before some court of competent jurisdiction, charging the suspected person of such offense, and shall verify such complaint by affidavit, but it shall be sufficient to state in such affidavit that he believes the facts stated in such complaint to be true. If any county attorney shall fail or refuse to faithfully perform any duty imposed upon him by this act he shall be deemed guilty of a misdemeanor, and on conviction thereof in the district court shall be fined in any sum not exceeding five hundred dollars, and on such conviction shall be deemed to be removed from office. If in any prosecution begun by the county attorney under the provisions of this section there shall be a failure to convict the proper costs of such prosecution shall be paid by the county in which such
71 prosecution was begun. It shall be the duty of the county attorney under penalty of forfeiture of his office to prosecute any and all persons guilty of any violation of the provisions of this act, and for each successful prosecution he shall be allowed a fee of fifteen dollars, which shall be taxed as costs in the case, but the

county shall in no case be liable therefor. The county attorney shall bring suit upon all bonds forfeited under the provisions of this act immediately upon the happening of such forfeiture to recover the penalty thereof, and all moneys collected thereon shall be paid into the school fund of the proper county. The county attorney shall be allowed a fee of ten per cent. upon all moneys so collected by him, to be paid out of the same.

SEC. 13. All places where intoxicating liquors are manufactured, sold, bartered, or given away, in violation of any of the provisions of this act, or where intoxicating liquors are kept for sale, barter, or use, in violation of this act, are hereby declared to be common nuisances, and upon the judgment of any court having jurisdiction finding such place to be a nuisance under this section the sheriff, his deputy or under sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place, and owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than sixty days nor more than ninety days, or both by such fine and imprisonment.

SEC. 14. Every person who shall by the sale, barter, or gift of intoxicating liquors cause the intoxication of any other person or persons shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and five dollars per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, to be recovered by civil action in any court having jurisdiction.

72

SEC. 15. Every wife, child, parent, guardian, or employer or other person who shall be injured in person or property or means of support by any intoxicated person or in consequence of intoxication, habitual or otherwise, or of any person, such wife, child, parent, or guardian shall have a right of action, in his or her own name, against any person who shall, by selling, bartering, or giving intoxicating liquors, have caused the intoxication of such person, for all damages actually sustained, as well as for exemplary damages, and a married woman shall have the right to bring suits, prosecute, and control the same, and the amount recovered the same as if unmarried, and all damages recovered by a minor under this act shall be paid either to such minor or to his or her parents, guardian, or next friend as the court shall direct; and all suits for damages under this act shall be by civil action in any of the courts of this State having jurisdiction thereof.

SEC. 16. Every person who shall, directly or indirectly, keep or maintain, by himself or by association or combining with others, or who shall in any manner aid, assist, or abet in keeping or maintaining, any club-room or other place in which any intoxicating liquor is received or kept for the purpose of use, gift, barter, or sale as a beverage or for distribution or division among the members of any club or association by any means whatever, and every person

who shall use, barter, sell, or give away, or assist or abet another in bartering, selling or giving away, any intoxicating liquors so received or kept, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than
73 one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months.

SEC. 17. The giving away of intoxicating liquor, or any shifts or device to evade the provisions of this act, shall be deemed an unlawful selling within the provisions of this act.

SEC. 18. All fines and costs assessed against any person or persons for any violation of this act shall be a lien upon the real estate of such person or persons until paid, and in case any person or persons shall let or lease any building or premises and shall knowingly suffer the same to be used and occupied for the sale of intoxicating liquor contrary to the provisions of this act, the premises so leased and occupied shall be subject to a lien for and may be sold to pay all fines and costs assessed against any such occupant for any violation of this act, and such liens may be enforced by civil action in any court having jurisdiction: Provided, That the person against whom such fines and costs are assessed shall be committed to the jail of the county until such fines and costs are paid.

SEC. 19. It shall be unlawful for any person to get intoxicated, and every person found in a state of intoxication shall, upon conviction thereof before any justice of the peace, be fined in the sum of five dollars, or be imprisoned in the county jail not exceeding ten days.

SEC. 20. Whenever application is made to the probate judge for a permit to manufacture or to sell intoxicating liquors under the provisions of this act, he shall notify the county attorney thereof, and thereupon such county attorney shall appear and advise with said probate judge with reference to the issuance of said permit and the approval of the bond. No person who shall inform of offenses under this act or make complaint therefor shall be liable for
74 the costs incurred in such prosecution, unless the court or jury trying the case shall find and determine that such prosecution was malicious and without probable cause.

SEC. 21. In all prosecutions under this act, by indictment or otherwise, it shall not be necessary to state the kind of liquor manufactured or sold, but shall be necessary to describe the place where sold, and it shall not be necessary to state the name of the person to whom sold, and in all cases the person or persons to whom such intoxicating liquors shall be sold in violation of this act shall be competent witnesses to prove such fact or any other fact tending thereto, and the members, shareholders, or associates in any club or association mentioned in section sixteen of this act shall be a competent witness- to prove any violation of the provisions of said section or of this act, or of any fact tending thereto.

SEC. 22. It shall be, and is hereby, made the duty of all courts of this State before whom a grand jury is summoned to charge such

grand jury especially concerning this act, and direct said jury to inquire particularly of all violations of any of its provisions.

SEC. 23. Chapter thirty-five of the general statutes of 1868 and all acts and parts of acts in conflict with this act are hereby repealed.

SEC. 24. This act shall be immediately published in the official State paper, and take effect and be in force from and after the first day of May, A. D. 1881.

Approved February 19, 1881.

75 "EXHIBIT B."

An act amendatory and supplemental to chapter 128 of the session laws of 1881, being an act entitled "An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes."

Be it enacted by the Legislature of the State of Kansas—

SECTION 1. That section 2 of chapter 128 of the session laws of 1881 shall be, and the same is hereby, amended so as to read as follows: Section 2. It shall be unlawful for any person or persons to sell, or barter for medical, scientific, or mechanical purpose, any malt, vinous, spirituous, fermented, or other intoxicating liquors without first having procured a druggist's permit therefor from the probate judge of the county wherein such druggist may at the time be doing business, and such probate judge is hereby authorized, in his discretion, to grant a druggist's permit for the period of one year to any person of good moral character who is lawfully and in good faith engaged in the business of a druggist in his county, and who, in his judgment, can be entrusted with the responsibility of selling said liquors for the purposes aforesaid in the manner hereinafter provided, and may, in his discretion, at any time revoke such permit. In order to obtain a druggist's permit under this act the applicant therefor shall present to the probate judge of the county wherein such applicant is engaged in business a petition signed by at least twelve freeholders having the qualifications of electors of the town-
76 ship or city wherein such business is located, certifying that the applicant is a person of good moral character and lawfully engaged in the business of a druggist. If satisfied that the petition is true, the probate judge may, in his discretion, grant a permit to the applicant to sell intoxicating liquors for medical, mechanical, and scientific purposes only, and such permit shall be recorded upon the journal of the probate court, and shall be posted in a conspicuous place in the store wherein such business is carried on before it shall be of any validity. The probate judge shall receive for his services the sum of five dollars, to be paid by the applicant.

SEC. 2. That section 3 of the act to which this is amendatory shall be, and the same is hereby, amended so as to read as follows:

SECTION 3. Any physician who is lawfully and regularly engaged in the practice of his profession as a business, and who, in case of

actual need, shall deem any of the liquors mentioned in section one of this act necessary for the health of his patients, may give such patient a written or printed prescription therefor, or may administer the same himself, but no such prescription shall be given or liquors administered except in case of actual need and where in his judgment the use of intoxicating liquors is necessary, and every physician who shall give such prescription or administer such liquors in violation of this act, and every physician who shall give to or write for any person a prescription for intoxicating liquors, for the purpose of enabling or assisting any person to evade any of the provisions of this act, or for the purpose of enabling or assisting any person to obtain any intoxicating liquors for use as a beverage, or to be sold or disposed of in any manner, in violation of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by
77 imprisonment in the county jail not less than ten days nor more than ninety days.

SEC. 3. That section 4 of said act, to which this is amendatory, shall be, and the same is hereby, amended so as to read as follows:

SECTION 4. Any druggist having a permit to sell intoxicating liquors under the provisions of this act may sell the same for medical purposes upon the written or printed statement of the applicant as hereinafter provided, or upon the written or printed prescription made and signed by a physician lawfully practicing his profession in the county wherein such druggist carries on his business, and such written or printed statement of the applicant —, and such druggist shall sell intoxicating liquors for mechanical and scientific purposes only upon the written or printed statement of the applicant, setting forth the particular purpose for which such liquor is required, the kind and quantity desired, and that it is not intended for a beverage nor to sell or give away, and when desired for medical purposes the said written or printed statement shall contain the foregoing particulars, and in addition thereto shall state that the liquor is necessary and actually needed for medical use for the patient to be named, and there shall be but one sale and but one delivery on any one prescription or statement, but no druggist shall permit the drinking on his premises of liquor purchased by prescription or otherwise: Provided, That such druggist shall be permitted to sell to any regularly practicing physician who is engaged in the practice of his profession any of the liquors above named upon his written or printed statement that said liquors will only be used for medicinal purposes. The statements provided for in this section shall be signed by the applicant in each case in the presence of and attested by the druggist to whom they are presented and shall be retained by such drug-
78 gist, and at the end of every thirty days, or within that time, said statements and prescriptions, together with the druggist's affidavit that the liquors therein mentioned are all the intoxicating liquors sold by him during the month, shall be filed by him in the office of the probate judge who issued his permit, where they shall be safely kept for two years from the date of said filing. Every

person whose statement so made for the purpose of obtaining intoxicating liquors shall be false in any material matter, or who shall sell or furnish any of the liquors thereon obtained to others as a beverage, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than ninety days. Every such druggist shall keep a book, wherein shall be recorded all sales of intoxicating liquors made by him, showing the name and residence of the purchaser, the kind and quantity of liquor sold, the purpose for which it was sold, the date of each sale, and, if upon prescription, the name of the physician making the same. Such record and prescription shall be open to the examination of the public at all reasonable times during business hours.

SEC. 4. That section 7 of the act to which this is amendatory shall be amended so as to read as follows: Sec. 7. Any person without taking out and having a permit to sell intoxicating liquors as provided in this act, or any person not lawfully and in good faith engaged in the business of a druggist, who shall, directly or indirectly, sell or barter any spirituous, malt, vinous, fermented, or other intoxicating liquors shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars, and be imprisoned in the county jail not less than thirty days nor more than ninety days.

79

SEC. 5. That section 8 of the act to which this is amendatory shall be amended so as to read as follows: Sec. 8. Any person, without taking out and having a permit to manufacture intoxicating liquors as provided in this act, who shall manufacture or aid or assist or abet in the manufacture of any of the liquors mentioned in section 1 of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall suffer the same punishment as provided in the last preceding section of this act for unlawfully selling such liquors, but nothing herein contained shall be construed to prohibit the making of wine or cider from grapes or apples grown and raised by the person making the same for his own use or the sale of wine for communion purposes.

SEC. 6. That section 9 of the act to which this is amendatory shall be amended so as to read as follows: Sec. 9. Every person having a permit to sell intoxicating liquors or to manufacture and sell intoxicating liquors under the provisions of this act who shall sell or barter such liquors in any other manner or for any other purpose than in this act provided, or who shall barter or sell the same to any person when he has reason to believe that the person purchasing the liquor is obtaining the same for any other than the excepted purposes, although he may have a prescription or shall have made the statement herein provided, or who shall sell to any person under the influence of liquor or who is in the habit of becoming intoxicated, or who shall allow liquor sold as a medicine or otherwise to be drank on his premises, or who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor,

and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars, and be imprisoned in the county jail not less than thirty days nor more than ninety days, and shall forfeit his permit issued under the provisions of this act, and for a period of five years his right to obtain a permit; and in all cases where forfeitures are provided under the provisions of this act the court shall declare the same in rendering judgment in the action.

SEC. 7. That section 12 of the act to which this act is amendatory shall be, and the same is hereby, amended so as to read as follows: Section 12. It shall be the duty of all sheriffs, deputy sheriffs, constables, marshals, police judges, and police officers of any city or town having notice or knowledge of any violations of the provisions of this act to notify the county attorney of the fact of such violation, and to furnish him the names of any witnesses within his knowledge by whom such violation can be proven. If any such officer shall fail to comply with the provisions of this section he shall, upon conviction, be fined in any sum not less than one hundred dollars nor more than five hundred dollars, and such conviction shall be a forfeiture of the office held by such person, and the court before whom such conviction is had shall, in addition to the imposition of the fine aforesaid, order and adjudge the forfeiture of his said office.

SEC. 8. If the county attorney of any county shall be notified by an officer or other person of any violation of any of the provisions of this act it shall be his duty forthwith to diligently inquire into the facts of such violation, and for such purpose he is hereby authorized and required to issue his subpœna for such person or persons as he may have reason to believe have any information or knowledge of such violation to appear before him at a time and place designated in such subpœna, then and there to testify concerning any violations of this act; said subpœna shall be directed to the sheriff or any constable of the county, and shall be served and returned to such county attorney in the same manner as subpœnas are served and returned in criminal cases. Each witness shall be sworn by the county attorney to testify the truth, the whole truth, and nothing but the truth and true answer make to all questions which may be propounded to him by such county attorney touching any violations of the provisions of this act, or the act to which this is amendatory. The testimony of every such witness shall be reduced to writing, and signed by such witness, as in the taking of depositions in civil cases. For all purposes in this section the county attorney is hereby authorized and empowered to administer oaths or affirmations to all witnesses, and shall have power to punish any witness for contempt for or on account of any disobedience of a subpœna, a refusal to be sworn or answer as a witness, or to sign his testimony, and may compel the attendance of witnesses by attachment in the same manner and with like effect as provided in the code of civil procedure. If the testimony so taken shall disclose the fact that an offence has been committed against any of the provisions of this act the county attorney shall forthwith file such statement, together

with his complaint or information, against the person having committed the offence in some court of compent jurisdiction, and such statement or testimony, together with the information or complaint of such county attorney, when verified by him on information and belief, shall have the same effect as if such information or complaint had been verified positively, and thereupon a warrant shall issue for the arrest of the person or persons named in such information as in other criminal cases, and in addition thereto shall command the officer to whom it may be directed to seize and take into his custody any and all intoxicating liquors, vessels, and bottles containing the same which he may find in such persons' possession, and
82 safely keep the same, subject to the order of the court: Provided, The sworn statement of the witness or witnesses, as hereinbefore provided, and the complaint or information filed by the county attorney shall particularly describe the property to be seized, and the place where kept, and if upon the trial of such person he shall be convicted of violating any of the provisions of this act the court shall order as a part of his judgment, in addition to the penalty herein provided, that the officer having the custody thereof shall publicly destroy all such property used and employed for such illegal purpose: Provided, The court shall find and adjudge the property so seized was being used and employed by the defendant for such illegal purposes.

SEC. 9. If the statement of any witness so taken before the county attorney, as in the last preceding section provided, shall disclose the fact that intoxicating liquors are being kept for unlawful sale or purpose, or are being sold by an unknown person or persons, particularly describing such unknown person or persons, contrary to the provisions of this act at any place, particularly describing the place to be searched and the property to be seized, as hereinafter provided, within such county, it shall be duty of such county attorney to forthwith file his complaint or information, together with such statement, with some court of competent jurisdiction against such place and the unknown keepers thereof, which information or complaint, when verified by such county attorney upon information and belief, together with such statement as aforesaid, shall have the same effect as if such information or complaint had been sworn to positively, and thereupon a warrant shall issue directed to the proper officer, commanding him to search the premises described in the information or complaint, and to seize all intoxicating liquors and all vessels or bottles containing the same, and arrest the
83 keeper or keepers thereof, and said person or persons, when arraigned before the court, shall plead to his or their real name or names, and shall be tried upon said complaint or information, and if found guilty shall be fined not less than one hundred dollars nor more than five hundred dollars, and be imprisoned in the county jail not less than thirty days nor more than ninety days, and the court before whom such conviction may be had shall also order all the property seized by the officer as aforesaid to be publicly destroyed: Provided, Said court shall also find and adjudge such property was being used by the defendant at the time of such

search and seizure for the purpose of unlawfully selling or bartering intoxicating liquors.

SEC. 10. Officers shall receive the same fees and mileage for serving subpœnas issued by county attorneys under the provisions of this act as provided in criminal cases, and witnesses shall receive the same fees for attendance as provided for witnesses in cases before the justices of the peace. Such fees shall be certified to the board of county commissioners by the county attorney and paid by the county as witness fees for attendance before a grand jury. All witnesses shall attend upon the county attorney in pursuance to his subpœna without the payment of any fees in advance. The county attorney shall be allowed a fee of twenty-five dollars upon each count upon which the defendant shall be convicted, and the same shall be taxed as costs in the case, but the county shall in no case be liable therefor. Upon all sums collected by the county attorney on forfeited recognizances under the provisions of this act he shall receive 20 per cent. thereof. If any prosecution begun by the county attorney or attorney general, or by a citizen with the written consent and approval of the county attorney or attorney general, under the provisions of this act shall fail, the costs of such prosecu-
84 tion, unless otherwise specified herein, shall be paid by the county in which such prosecution or action was begun.

SEC. 11. It shall be the duty of the county attorney to diligently prosecute any and all persons violating any of the provisions of this act in their respective counties, and to bring suit upon all bonds or recognizances forfeited, immediately after the happening of such forfeiture, to recover the penalty, and pay all money so collected, less his fee for collecting the same, as herein provided, into the school fund of his county. If any county attorney shall fail, neglect, or refuse to faithfully perform any duty imposed upon him by this act he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars, and be imprisoned in the county jail not less than ten days nor more than ninety days, and such conviction shall operate as a forfeiture of his office, and the court before whom such conviction may be had shall order and adjudge such forfeiture of office in addition to the fine imposed, as herein provided. And whenever the county attorney shall be unable or shall neglect or refuse to enforce the provisions of this act in his county, or for any reason whatever the provisions of this act shall not be enforced in any county, it shall be the duty of the attorney general to enforce the same in such county, and for that purpose he may appoint as many assistants as he shall see fit, and he and his assistants shall be authorized to sign, verify, and file all such complaints, informations, petitions, and papers as the county attorney is authorized to sign, verify, or file, and to do and perform any act that the county attorney might lawfully do or perform, and for such services he shall receive the same fees that the county attorney would be entitled to for like services, to be taxed and collected in the same manner.

SEC. 12. Any person who shall take or receive any order
85 for intoxicating liquor from any person in this State other

than a person authorized to sell the same, as in this act provided, or any person who shall, directly or indirectly, contract for the sale of intoxicating liquors with any person in this State other than a person authorized to sell the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished therefor as provided in this act for selling intoxicating liquors.

SEC. 13. That section 13 of the act to which this is amendatory shall be, and the same is hereby, amended so as to read as follows:

SECTION 13. All places where intoxicating liquors are manufactured, sold, bartered, or given away, in violation of any of the provisions of this act, or where intoxicating liquors are kept for sale, barter, or delivery, in violation of this act, are hereby declared to be common nuisances, and upon the judgment of any court having jurisdiction finding such place to be a nuisance under this section the sheriff, his deputy or under sheriff, or any constable of the proper county, or marshal of any city where the same is located shall be directed to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance, and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than ninety days. The attorney general, county attorney, or any citizen of the county where such nuisance exists, or is kept, or is maintained may maintain an action in the name of the State to abate and perpetually enjoin the same. The
86 injunction shall be granted at the commencement of the action, and no bond shall be required. Any person violating the terms of any injunction granted in such proceedings shall be punished as for contempt by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment, in the discretion of the court.

SEC. 14. That section 21 of said act shall be, and the same is hereby, amended so as to read as follows: Section 21. In prosecutions under this act by indictment or otherwise it shall not be necessary to state the kind of liquor manufactured or sold, and shall not be necessary to describe the place where so sold, except in prosecutions for keeping and maintaining a common nuisance or when a lien is sought to be established against the place where such liquors were illegally sold; and it shall not be necessary to state the name of the person to whom sold, and it shall not be necessary in the first instance for the State to prove that the party charged did not have a permit to sell intoxicating liquors for the excepted purposes; and in all cases the person or persons to whom such intoxicating liquors shall have been sold in violation of this act shall be competent witnesses to prove such fact, or any other fact tending thereto; and the members, shareholders, or associates in any club or association mentioned in section sixteen of the act to which this

act is amendatory shall be competent witnesses to prove any violation of the provisions of said section or of this act, or of any fact tending thereto. No person shall be excused from testifying touching any offense committed by another against any of the provisions of this act by reason of his testimony tending to criminate himself, the witness, but the testimony given by such person shall in no case be used against him.

SEC. 15. Whenever the father, mother, brother, sister, wife,
87 husband, or guardian or any relative of any person shall notify any druggist that such person naming him uses intoxicating liquors as a beverage, and shall forbid said druggist from selling, bartering, or giving to such person any intoxicating liquors, it shall be unlawful for any such druggist, after such notice, to let such person have any intoxicating liquors upon any terms or conditions whatever. Any druggist who shall violate the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars, and shall be imprisoned in the county jail for a period of not less than thirty days nor more than six months.

SEC. 16. The treating or giving of any intoxicating liquors to any minor by any person other than the father, mother, or guardian of such minor, or a physician for medical purposes, shall be unlawful, and any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished therefor as provided in the last preceding section of this act for unlawfully selling intoxicating liquors.

SEC. 17. Any officer, agent, or employé of a railroad company, express company, or other common carrier who shall knowingly carry or deliver any intoxicating liquor to or for any person to be sold in violation of this act, or the act to which this is amendatory and supplemental, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred nor more than five hundred dollars, and be imprisoned in the county jail not less than thirty nor more than sixty days.

SEC. 18. Any citizen may employ an attorney to assist the county attorney to perform his duties under this act, and such at-
88 torney shall be recognized by the county attorney and the court as associate counsel in the proceeding, and no prosecution shall be dismissed over the objection of such associate counsel until the reasons of the county attorney for such dismissal, together with the objections thereto of said associate counsel, shall have been filed in writing, argued by counsel, and fully considered by the court.

SEC. 19. Original sections two, three, four, seven, eight, nine, twelve, thirteen, and twenty-one of the said act to which this act is amendatory and supplemental are hereby repealed. All prosecutions pending at the time of the taking effect of this act shall be continued the same as if this act had not been passed.

SEC. 20. This act shall take effect and be in force from and after its publication in the official State paper.

Approved March 7, 1885.

EXHIBIT "C."

An act to restrain dram-shops and taverns and to regulate the sale of intoxicating liquors.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Before a dram-shop license, tavern license, or grocery license shall be granted to any person applying for the same, such person, if applying for a township license, shall present to the tribunal transacting county business a petition or recommendation, signed by a majority of the residents of the township of
89 twenty-one years of age and over, both male and female, in which such dram-shop, tavern, or grocery is to be kept, or, if the same is to be kept in any incorporated city or town, then to the city council thereof a petition signed by a majority of the residents of the ward of twenty-one years of age and over, both male and female, in which said dram-shop, tavern, or grocery is to be kept, recommending such person as a fit person to keep the same, and requesting that a license be granted to him for such purpose: Provided, That the corporate authorities of cities of the first and second class may by ordinances dispense with the petition mentioned in this section.

SECTION 2. Upon every license granted to a dram-shop keeper and upon every license granted to a tavern keeper or grocery keeper there shall be levied a tax of not less than one hundred dollars nor more than five hundred dollars for every period of twelve months, the amount of tax to be determined by the tribunal granting the license, the said tax to be paid into the treasury of the county or city granting such license, and it shall be the duty of the board of county commissioners to appropriate all moneys received by such tribunal for license under this act for the benefit of the township in which such license was granted, and all incorporated cities shall appropriate the moneys received by such cities for license under this act, as the council thereof may provide.

SEC. 3. Any person, without taking out and having a license as grocer, dram-shop keeper, or tavern keeper, who shall, directly or indirectly, sell any spirituous, vinous, or fermented or other intoxicating liquors shall be fined in any sum not more than one hundred dollars for each offense, and any person convicted of violating any of these provisions shall for every second or subsequent offense be fined a sum not more than the above named, or may be indicted for a misdemeanor, and fined not less than one hundred nor more
90 than five hundred dollars, and imprisoned in the county jail not more than six months.

SEC. 4. Any person who shall keep open any porter, ale, or beer house, grocery, dram-shop, or tippling house, or shall sell or retail any fermented, distilled, or intoxicating liquors on the first day of the week, commonly called Sunday, the Fourth of July, or upon any election day shall, on conviction thereof, be adjudged guilty of a misdemeanor, and fined a sum not less than twenty-five dollars nor more than — hundred dollars, or be imprisoned in the county jail not less than ten nor more than thirty days, or by both such fine

and imprisonment. If such person is licensed as a grocer, dram-shop keeper, or tavern keeper he shall, in addition to the above provision, forfeit his license and shall not again be allowed to obtain a license under the law for the period of two years next after conviction.

SEC. 5. Before any person shall be licensed as a dram-shop keeper, or grocer, or tavern keeper, under the provisions of this act, he shall execute to the tribunal granting such license a bond in the sum of two thousand dollars, with at least two securities, to be approved by said tribunal, conditioned that he will not keep a disorderly house; that he will not sell, or permit to be sold, any intoxicating liquors to any minor without the consent of the guardian of such minor; that he will not keep his dram-shop, tavern, or grocery open on Sundays, Fourth of July, or any election day, nor will he sell, or allow to be sold, thereat on Sunday, Fourth of July, or any election day, directly or indirectly, any intoxicating liquors, and, upon said person being convicted of any of the offenses enumerated therein, suit may be brought against said principal and securities to recover the amount of the fine or fines adjudged against him on said conviction in any court of competent jurisdiction.

SEC. 6. Every — who shall, directly or indirectly, knowingly
91 sell, barter, or give away any intoxicating liquor to any person who is in the habit of being intoxicated, after notice shall have been given him by the wife, child, parent, brother, or sister of such person, or by any civil officer charged with the care or custody of the poor of the township, city, or ward where he resides, that such person is in the habit of being intoxicated, or to any person in a state of intoxication, or to any minor without the consent of his parent or guardian, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine not less than five nor more than one hundred dollars, or by imprisonment not less than ten nor more than sixty days, or by both such fine and imprisonment.

SEC. 7. All places where intoxicating liquors are sold in violation of this act shall be taken, held, and declared to be common nuisances, and all rooms, taverns, eating-houses, bazaars, restaurants, groceries, coffee-houses, cellars, or other places of public resort where intoxicating liquors are sold in violation of this act shall be shut up and abated as public nuisances.

SEC. 8. It shall be unlawful for any person to get intoxicated, and every person found in a state of intoxication shall, upon conviction thereof before any justice of the peace, be fined the sum of five dollars.

SEC. 9. Every person who shall, by the sale, barter, or gift of intoxicating liquors, cause the intoxication of any other person, such person or persons shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and five dollars per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, which sum may be recov-
92 ered by a civil action before any court having jurisdiction.

SEC. 10. Every wife, child, parent, guardian, employer, or

other person who shall be injured in person or property or means of support by any intoxicated person such wife, child, parent, guardian, employer, or other person shall have a right of action in his or her own name against any person who shall, by selling, bartering, or giving intoxicating liquors, have caused the intoxication of such person for all damages actually sustained, as well as exemplary damages, and a married woman shall have the right to bring suits, prosecute and control the same, and the amount recovered the same as if unmarried, and all damages recovered by a minor under this act shall be paid either to such minor or to his or her parents, guardian, or next friend as the court shall direct, and all suits for damages under this act shall be by civil action in any of the courts of this State having jurisdiction thereof.

SEC. 11. The giving away of intoxicating liquors, or other shifts or device to evade the provisions of this act, shall be deemed and held to be an unlawful selling within the provisions of this act.

SEC. 12. For all the fines and costs assessed against any person or persons for any violation of this act the real estate and personal property of such person and persons, of every kind not exempt, shall be liable for the payment thereof, and such fines and costs shall be a lien upon such real estate until paid, and, in case any person or persons shall rent or lease any buildings or premises, and knowingly suffer the same to be used and occupied for the sale of intoxicating liquors, contrary to this act, such building and premises so leased and occupied shall be held liable for and may be sold to pay all fines and costs assessed against the person occupying such building or premises for any violation of this act.

93 SEC. 13. In all prosecutions under this act by indictment or otherwise it shall not be necessary to state the kind of liquor sold, but shall be necessary to describe the place where sold, and for any violations of the third and fourth sections it shall not be necessary to state the name of any person to whom sold, and in all cases the person or persons to whom intoxicating liquors shall be sold in violation of this act shall be competent as witnesses to prove such fact or any other tending thereto.

SEC. 14. All sales of intoxicating liquors made by a keeper of a dram-shop on a credit shall be void and of no effect, and the debt thereby attempted to be created shall not be recoverable at law.

SEC. 15. This act shall take effect and be in force from and after its publication in the statute book.

Approved March 3, 1868.

Endorsed: No. 5677. The State of Kansas on the relation of J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, Kansas, *vs.* Herman Ziebold and Joseph Hagelin, partners as Ziebold & Hagelin. Bill. Filed Feb. 10, 1887. A. S. Thomas, clerk.

94 *Answer.*

In the Circuit Court of the United States for the District of Kansas.

THE STATE OF KANSAS on the Relation of J. F. TUFTS, Assistant Attorney General of the State of Kansas for Atchison County, Kansas, Complainant,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold & Hagelin, Defendants.

The joint and several answers of Herman Ziebold and Joseph Hagelin, partners as Ziebold & Hagelin, to the amended and recast bill of complaint of the State of Kansas on the relation of J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, Kansas.

These defendants, now and at all times hereafter, reserving all manner of benefit and advantage to themselves of exception to the many errors and insufficiencies in said bill contained, for answer thereunto, or unto so much or such parts thereof as these defendants are advised is material for them to make answer unto, *they* answer and say that they are citizens of the State of Kansas and of the United States of America, and that the amount in controversy herein, exclusive of costs, exceeds the sum of five hundred dollars, and exceeds the sum of six thousand dollars.

Defendants admit that the premises described in the bill of complaint herein are owned and controlled, operated and maintained, by said defendants for the purpose of manufacturing beer
95 and keeping the same for sale, and is a place where such liquors *is* manufactured and kept for sale.

And defendants admit that they, the said defendants, or either of them have no permit granted or issued by the probate judge of Atchison county, Kansas, authorizing said defendants or either of them to sell, barter, or give away, or keep for barter, sale, or gift, any intoxicating liquors, or to manufacture intoxicating liquors for any purpose.

And said defendants are the owners of the premises above described, and have full knowledge of the purpose for which said place is being used, and know that said premises are being used as a place wherein intoxicating liquors are sold, bartered, and given away, and are kept for barter, sale, and gift, and are manufactured for barter, sale, and gift, and that the defendants and each of them have no permit issued, according to law, by the probate judge of Atchison county, Kansas, and knowing the fact the defendants conduct and carry on said business therein and maintain said place, but these defendants say that the law under which this proceeding has been instituted is in conflict with the Constitution of the United States of America, and therefore void, and that if void these defendants have the right to carry on and prosecute their lawful business, and that any interference therewith by virtue of the proceedings herein instituted will damage these defendants largely in excess of five hundred dollars, exclusive of costs.

other person who shall be injured in person or property or means of support by any intoxicated person such wife, child, parent, guardian, employer, or other person shall have a right of action in his or her own name against any person who shall, by selling, bartering, or giving intoxicating liquors, have caused the intoxication of such person for all damages actually sustained, as well as exemplary damages, and a married woman shall have the right to bring suits, prosecute and control the same, and the amount recovered the same as if unmarried, and all damages recovered by a minor under this act shall be paid either to such minor or to his or her parents, guardian, or next friend as the court shall direct, and all suits for damages under this act shall be by civil action in any of the courts of this State having jurisdiction thereof.

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SEC. 12. For all the fines and costs assessed against any person or persons for any violation of this act the real estate and personal property of such person and persons, of every kind not exempt, shall be liable for the payment thereof, and such fines and costs shall be a lien upon such real estate until paid, and, in case any person or persons shall rent or lease any buildings or premises, and knowingly suffer the same to be used and occupied for the sale of intoxicating liquors, contrary to this act, such building and premises so leased and occupied shall be held liable for and may be sold to pay all fines and costs assessed against the person occupying such building or premises for any violation of this act.

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These defendants, now and at all times hereafter, reserving all manner of benefit and advantage to themselves of exception to the many errors and insufficiencies in said bill contained, for answer thereunto, or unto so much or such parts thereof as these defendants are advised is material for them to make answer unto, *they* answer and say that they are citizens of the State of Kansas and of the United States of America, and that the amount in controversy herein, exclusive of costs, exceeds the sum of five hundred dollars, and exceeds the sum of six thousand dollars.

Defendants admit that the premises described in the bill of complaint herein are owned and controlled, operated and maintained,
95 by said defendants for the purpose of manufacturing beer and keeping the same for sale, and is a place where such liquors *is* manufactured and kept for sale.

And defendants admit that they, the said defendants, or either of them have no permit granted or issued by the probate judge of Atchison county, Kansas, authorizing said defendants or either of them to sell, barter, or give away, or keep for barter, sale, or gift, any intoxicating liquors, or to manufacture intoxicating liquors for any purpose.

And said defendants are the owners of the premises above described, and have full knowledge of the purpose for which said place is being used, and know that said premises are being used as a place wherein intoxicating liquors are sold, bartered, and given away, and are kept for barter, sale, and gift, and are manufactured for barter, sale, and gift, and that the defendants and each of them have no permit issued, according to law, by the probate judge of Atchison county, Kansas, and knowing the fact the defendants conduct and carry on said business therein and maintain said place, but these defendants say that the law under which this proceeding has been instituted is in conflict with the Constitution of the United States of America, and therefore void, and that if void these defendants have the right to carry on and prosecute their lawful business, and that any interference therewith by virtue of the proceedings herein instituted will damage these defendants largely in excess of five hundred dollars, exclusive of costs.

These defendants further allege that the amount of property involved in this controversy and which will be affected by a decision of this action is of the value of more than five hundred dollars, exclusive of costs herein. And these defendants further say that on or about September 1st, 1871, the said defendants purchased the property described in the bill of complaint. That the said build-
96 ings were erected and at the time of the purchase as aforesaid used for manufacturing, making, and brewing beer, and that the said defendants purchased said property for the sole use and purpose of manufacturing, making, and brewing beer, and for no other purpose.

That said property was then worth and was of the value of $25,000, and said defendants say that from and since the purchase of said buildings as aforesaid they have carried on the business therein of making, brewing, and manufacturing beer continuously until the commencement of this action; that after the purchase of said buildings and property they have, at various times since then, erected and made improvements thereto by putting up additional buildings, cellars, and making other necessary improvements, and putting additional machinery therein for the purpose and for use in their said business as aforesaid as hereinafter shown; that in the year 1873 they built and constructed a patent ice-cellar, attached to and adjoining said buildings, which cost and was worth to them of the value of $5,000.00; that in 1875 they built another patent ice-cellar for the use and purpose of their business, adjoining to said buildings, of the value of $5,000.00; that during the year 1879 they constructed an addition to said buildings purchased as aforesaid, and connected therewith for use in their said business, which was of the value of $6,000.00; that during the same year they constructed an ice-cellar, adjoining said buildings, for use in their said business, which cost and was worth and was of the value of $2,000.00; that since said time they have been forced to make necessary improvements of the cellars connected with the said business as aforesaid, which cost and was worth the value of $2,000.00; that prior to the 1st of January, 1880, and since the first of September,
1871, they also purchased and put into said building a large
97 amount of machinery, appliances, bottles, and attachments for the sole and exclusive use of manufacturing, making, and brewing beer, and these defendants here submit and specify a list of the personal property purchased as aforesaid, and the value thereof, together with a recapitulation of the real estate, buildings, and improvements as aforesaid, on said premises, and the value thereof, to wit:

Real estate:

Value of the said buildings and property purchased as aforesaid	$25,000
One patent ice-cellar	5,000
One patent ice-cellar	5,000
Addition to original buildings	6,000

Ice-house	2,000	
Repairing buildings and cellars	2,000	
Total		$45,000
Personal property:		
Engine and boiler	$800	
Shafting and elevator	300	
Tubs, vats, and cooling-ships	1,200	
Pipes and pumps	1,000	
Barrels	3,375	
Kegs	1,000	
Mash-machine	300	
Malt-machine	300	
Fermenting-tubs	600	
Patent beer-cooler	300	
Total		$9,175
Total real estate and personal property		$54,175

98 And these defendants further say that at the time of the commencement of this suit *that* said defendants had manufactured and had on hand and unsold beer and material for making beer, which beer was worth and of the value of $5.000.00, and said material for making beer was malt, which was worth and was of the value of three hundred dollars, and barley, which was worth and was of the value of $600.00, and hops, which was worth and was of the value of $300.00—total, sixty-two hundred; that the said malt, barley, and hops on hand was bought and kept for the sole purpose and use of making, manufacturing, and brewing beer.

And defendants say that at the time of the purchase of said brewery and buildings, machinery and property connected therewith, and when they made the improvements thereon and purchased the additional machinery and appliances connected therewith *that* the laws of the State of Kansas permitted and allowed the making, brewing, and manufacturing of beer, and such business was lawful. And defendants state that they, the said firm of Ziebold & Hagelin, purchased said property and made improvements thereon and bought the machinery and appliances connected therewith at the times aforesaid for the sole and exclusive use and purpose of making, manufacturing, and brewing beer, and for no other purposes whatever; that they have used all of said property in said business since the same was purchased, and have conducted no other business therein; that said property is not suitable and could not be used for any other business whatever, owing to the peculiar construction and their location; that the cellars on said premises are built solely and expressly at greater expense for storing beer therein and the rooms and apartments of the building were constructed solely for the purpose of manufacturing beer therein, and could be adapted to no other pur-

pose; that the value of said buildings on the first day of
99 January, 1880, and during all of said year, was of the sum of $45,000, and said buildings are now, and have been since the year 1880, worth and of the value of $45,000.00, provided they are allowed to make, manufacture, and brew beer therein, but if they are prohibited and enjoined from using said buildings the same would not be worth to exceed $5,000; that the machinery and appliances in said buildings, on the 1st day of January, 1880, were worth the sum of $9,175.00; that said machinery and appliances are now, and have been ever since the 1st day of January, 1880, worth and are of the value of $9,175.00, provided the said defendants are allowed to use the same for the purpose for which they were bought, to wit, the making, manufacturing, and brewing of beer, but if said defendants should be enjoined and restrained from using said machinery and appliances they would not be worth to exceed $1,000.00.

And the defendants further say that they have no other business or occupation other than that of making, manufacturing, and brewing beer; that they have spent fifteen years in purchasing, putting up, and improving said buildings, machinery, and appliances and in building up their trade and learning their said business; that they have no other means of support other than that derived from said brewery; that if they are not permitted to carry on their said business it will result in their total ruin and bankruptcy, and will prevent them from supporting their families, who rely upon them entirely for support; that no compensation has been made or tendered to said defendants for the value of their said property, which value will be destroyed as aforesaid, and no proceedings have been instituted or had for the purpose of making compensation to said defendants for destruction of the value of their said property, and that the law under which this proceeding has been instituted
100 does not authorize or provide that any compensation shall be made to these defendants for the destruction of their said property, and no other law of the State of Kansas authorizes or provides for such compensation.

And defendants say that the law under which this proceeding has been instituted is in conflict with and contravention of the Constitution of the United States of America, and particularly and especially that portion of said Constitution which reads as follows: Art. 4. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. And also that portion of section 1, art. 14, of the Constitution of the United States which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protections of the laws.

That notwithstanding said provisions of the Constitution of the United States of America the Legislature of the State of Kansas, by

an act entitled "An act amendatory of and supplemental to chapter one hundred and twenty-eight of the session laws of 1881," being an act entitled "An act to prohibit the manufacture and sale of intoxicating liquors except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes," approved March 7, 1885, provided by section one of said act that it shall be unlawful for any person or persons to sell, barter for medical, scientific, or mechanical purposes any
101 malt, vinous, spirituous, fermented, or other intoxicating liquors without first having procured a druggist's permit therefor from the probate judge of the county wherein such druggist may at the time be doing business, etc.

That this suit is brought and prosecuted against the defendants because, and only because, it is claimed that said defendants had not taken out and procured a druggist's permit, and because no permit had been granted or issued by the probate judge of Atchison county, Kansas, authorizing the said defendants to sell, barter, or give away, or to keep for barter, sale, or gift, any intoxicating liquors, and to manufacture beer.

That it is not alleged or pretended that said defendants are or have been engaged in the traffic or sale of intoxicating liquors for other than medical, scientific, and mechanical purposes, but that the place where said defendants are alleged to be and to have been engaged in the sale of intoxicating liquors is claimed and pretended to be a nuisance because, and only because, it is alleged that defendants have no permit granted or issued by the probate judge of Atchison county, Kansas, authorizing the said defendants to sell, barter, or give away, or keep for barter, sale, or gift, any intoxicating liquors, and to manufacture beer in said buildings, and defendants *is* sought to be enjoined from the prosecution of said business because it is alleged that they have not taken out and obtained a permit from said probate judge, and for that reason alone it is claimed and pretended that said defendants' place of business should be shut up and abated as a public nuisance, and that upon a judgment of this court finding such place to be a nuisance under the provisions of section thirteen of said act hereinbefore referred to *that* the sheriff of Atchison county, Kansas, his deputy or under sheriff, or any constable of the proper county, or marshal of
102 any city where the same is located, shall be directed to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining such alleged nuisance.

Said defendants claim, aver, and state that long prior to the passage of said acts by the Legislature, and prior to the year 1881, and since 1870, these defendants had erected, constructed, and built certain buildings, described in plaintiff's petition, of brick and stone, for the sole use of making and manufacturing beer therein, and purchased and placed therein costly and expensive machinery for the sole use of making and manufacturing beer, as hereinbefore alleged; that said buildings and machinery can only be used for

the purpose of making and manufacturing beer, and is useless and entirely worthless for any other purpose, and the said buildings and machinery are not adapted for any other purpose; that the laws of the State of Kansas authorized and permitted the making and manufacturing of beer and the sale thereof without any permit, as is now required, when said buildings were constructed and machinery placed therein by these defendants.

That if these defendants are not allowed to use said buildings and machinery for the manufacture of beer, for which such buildings were erected and said machinery purchased, it will render said property useless for any other purpose, and will be of no value whatever, and will financially ruin and bankrupt these defendants.

And said defendants state that the value of said buildings when constructed was then and now is $50,000.00, and the machinery was and is worth the sum of $10,000.00, total costs and value of said buildings and machinery being the sum of $60,000.00.

103 These defendants claim and aver that said provisions of said act of the Legislature of the State of Kansas, hereinbefore referred to, as well as each section and provision thereof under which the right is claimed to prosecute this action, is class legislation, and in effect abridges the privileges and immunities of these defendants as citizens of the United States and as citizens of the State of Kansas, and its enforcement would deprive these defendants of their property without the due process of law, and deny defendants the equal protection of the law, and would subject these defendants to unreasonable search and to unreasonable seizure and destruction of their property without probable cause therefor; and that said law and all the provisions thereof is void and in conflict with and in contravention of said section one, 1, article fourteen, 14, of the Constitution of the United States, as also said article four, 4, of said Constitution of the United States of America.

And these defendants deny all unlawful combination in said bill charged; without that, any other matter or thing material for them to make answer to and not herein sufficiently answered, avoided, or denied is true to the knowledge and belief of these defendants; all which matters and things these defendants are ready to aver and prove as this court shall direct; and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

EVEREST & WAGGONER AND
TOMLINSON & EATON,
Solicitors for Defendants.

STATE OF KANSAS, }
County of Atchison, } ss:

Herman Ziebold and Joseph Hagelin, being first duly sworn, say that they are the defendants named in the above and foregoing answer, and that they have read and heard read the same and know the facts and statements therein set forth and representations therein made to be true of their own knowledge.

104

HERMAN ZIEBOLD.
JOSEPH HAGELIN.

Subscribed and sworn to before me this 10th day of February, A. D. 1887.

[SEAL.] W. J. RATERMAN,
Notary Public.

Com. expires Feb. 11th, 1890.

Endorsed: No. 5677. The State of Kansas on the relation of J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, Kansas, *vs.* Herman Ziebold & Joseph Hagelin, partners as Ziebold & Hagelin. Answer. Filed Feb. 10, 1887. A. S. Thomas, clerk.

105 At a term of the circuit court of the United States of America for the district of Kansas, in the eighth circuit, began and held in the city of Topeka, in said district, on the 22nd day of November, 1886.

THE STATE OF KANSAS on the Relation of J. F. TUFTS, Assistant Attorney General of the State of Kansas for Atchison County, Kansas, Complainant,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold & Hagelin, Defendants.

Now, this 10th day of February, 1887, this cause came on to be heard on motion of the complainant submitting on amended and recast bill and answer of the defendants and was argued by counsel, and thereupon, upon consideration thereof, it is now, by the court here, ordered, adjudged, and decreed as follow, viz: That the court finds for the defendant, and that the complainant is not entitled to the relief prayed for in the bill of complaint herein, and the bill is hereby dismissed at complainant's costs taxed, to which order, judgment, and decree the complainant excepted, and now prays an appeal to the Supreme Court of the United States, which is now allowed, and the bond in appeal fixed at $300; and the bond now here produced is hereby approved.

DAVID J. BREWER,
Circuit Judge.

Endorsed: No. 5677. The State of Kansas on the relation of J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, Kansas, *vs.* Herman Ziebold & Joseph Hagelin, partners as Ziebold & Hagelin. Decree. Filed Feb. 10, 1887. A. S. Thomas, clerk.

106 In the Supreme Court of the United States.

THE STATE OF KANSAS on the Relation of J. F. TUFTS, Assistant Attorney General of the State of Kansas for Atchison County, Complainant,

vs.

HERMAN ZIEBOLD and JOSEPH HAGELIN, Partners as Ziebold & Hagelin, Defendants.

Know all men by these presents that S. B. Bradford and E. A. Austin, of Topeka, of Shawnee county, Kansas, *is* held and firmly bound unto Herman Ziebold and Joseph Hagelin, partners as Ziebold & Hagelin, defendants, in the sum of three hundred dollars, to be paid to the said Ziebold and Hagelin, defendants, and their executors or assigns; to which payment, well and truly to be made, — bind ourselves and our heirs, executors, and administrators, firmly by these presents.

Seal- with our seal- and dated this 10th day of February, 1887.

Whereas the above-named complainant, The State of Kansas on the relation of J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, h*ave* taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the district of Kansas:

Now, therefore, the condition of this obligation is such that if the said-named complainant, The State of Kansas on the relation of J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, Kansas, shall prosecute its said appeal to effect and answer all damages and costs if it shall fail to make good its
107 plea, then this obligation shall be void; otherwise — remain in full force and virtue.

S. B. BRADFORD.
EDWIN A. AUSTIN.

Bond approved:
DAVID J. BREWER, *Judge.*

Endorsed: No. 5677. The State of Kansas on the relation of J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, Kansas, *vs.* Herman Ziebold and Joseph Hagelin, partners as Ziebold & Hagelin. Bond. Filed Feb. 10, 1887. A. S. Thomas, clerk.

108 UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy from the record of all the proceedings in the suit of The State of Kansas *ex rel.* J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, *vs.* Herman Ziebold and Joseph Hagelin, partners as Ziebold & Hagelin, No. 5677 in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 5th day of March, A. D. 1887.

{The Seal of the Circuit Court of the United States, District of Kansas, 1862.}

A. S. THOMAS, *Clerk.*

109 By the honorable D. J. Brewer, one of the judges of the circuit court of the United States for the district of Kansas, to Herman Ziebold and Joseph Hagelin, partners as Ziebold & Hagelin:

Whereas the State of Kansas on the relation of J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the district of Kansas, made in favor of you, the said Herman Ziebold and Joseph Hagelin, partners as Ziebold & Hagelin, and have *required* the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, D. C., on the 15th day of March, A. D. 1887, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Leavenworth, in the district of Kansas, in the 8th circuit, this 10th day of February, A. D. 1887.

DAVID J. BREWER, *Judge.*

We hereby accept service of this citation and enter our appearance in the Supreme Court of the United States for the above-named appellee.

EVEREST & WAGGONER &
TOMLINSON & EATON,
Solicitors for Defendants.

[Endorsed:] No. 5677. The State of Kansas on the relation of J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, Kansas, *vs.* Herman Ziebold and Joseph Hagelin, partners as Ziebold & Hagelin. Citation. Filed Feb. 10, 1887. A. S. Thomas, clerk.

110 In the Supreme Court of the United States.

THE STATE OF KANSAS on the Relation of J. F. TUFTS, Assistant Attorney General of the State of Kansas for Atchison County, Kansas, Appellant,

vs.

ZIEBOLD and HAGELIN, Appellees.

The appeal of the State of Kansas on the relation of J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, Kansas.

To the honorable the Supreme Court of the United States:

The above-named appellant and complainant respectfully shows to the court that on the 13th day of August, 1886, the above-named

complainant and appellant, The State of Kansas on the relation of J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, Kansas, filed its petition in the district court of Atchison county, Kansas, against the above-named defendants and appellees, Ziebold and Hagelin, in which petition the complainant avers that certain premises therein described is a place where spirituous, vinous, fermented, malt, and other intoxicating liquors are, and have been for several months last past, bartered, sold and given away, and where intoxicating liquors are kept for barter, sale and gift, in violation of law, and are manufactured for barter, sale, and gift in the State of Kansas, and that said place, in consequence thereof, is a common nuisance to the State of Kansas.

The petition prays that the said premises may be adjudged a common nuisance, and that an order may issue directing the sheriff or other proper officer to shut up and abate said place, and that the said defendants be enjoined from using or permitting to be
111 used such place where intoxicating liquors are sold, bartered, or given away, or are kept for barter, sale, or gift, or otherwise than by authority of law, and are manufactured for barter, sale and gift in the State of Kansas.

That afterwards the said defendants filed their bond and petition for removal to the circuit court of the United States, which application was, by the district court of Atchison county, Kansas, refused.

That the defendants and appellees, notwithstanding, filed in the circuit court of the United States a duly certified transcript of said proceedings, and thereafter the complainant and appellant filed its plea in abatement to the jurisdiction of the circuit court, which plea was by the court overruled; and afterwards, on an order of the circuit court to amend and recast the plea, the complainant and appellant filed an amended and recast bill alleging and praying as in the original petition, and the defendants and appellees filed their answer to said amended and recast bill alleging that, at the time they purchased and erected the buildings and premises described in the bill, the laws of the State of Kansas permitted the manufacture of beer and intoxicating liquors without any restrictions; that said buildings and premises were erected for that especial purpose, and that said property was useless for any other purpose than that for which they were constructed, to wit, the manufacture of beer and other intoxicating liquors, and if enjoined from prosecuting that particular business they would suffer a total loss of the value of the buildings; that the law under which this prosecution was instituted was void and unconstitutional, and the provisions thereof were in violation of and in contravention to the provisions of article 4 and section one of article 14 of the amendments to the Constitution of the United States.

That on Thursday, February 10th, 1887, at the November
112 term, 1886, this cause being submitted on bill and answer, a final decree was made and pronounced in the cause, wherein it was in substance adjudged and decreed that the complainant and appellant, The State of Kansas on the relation of J. F. Tufts, assist-

ant attorney general of the State of Kansas for Atchison county, Kansas, was not entitled to the relief prayed for, and dismissing said bill at the cost of said complainant and appellant.

Wherefore appellant appeals from said order of the court overruling said plea in abatement, to the jurisdiction of the court, and from said final decree of the circuit court of the United States, and respectfully prays that the decree of said circuit court, and the bill, answer, plea in abatement, transcript, and all exhibits, evidence, proofs, and proceedings in said cause may be sent to the Supreme Court of the United States without delay, and that said order overruling said plea in abatement and said decree dismissing said bill may be reversed, and a decree made by the Supreme Court; that said law is not unconstitutional for the reasons stated; that said complainant and appellant is entitled to the relief prayed for in the petition and bill, and that the cause be remanded to the district court of Atchison county, Kansas, for final trial and hearing, and for costs against said defendants and appellees in favor of said complainant and appellant in this court and in the circuit court of the United States, and for such other decree as to the said Supreme Court may seem just.

S. B. BRADFORD,
Att'y General and Solicitor for the Appellant.

Endorsed on cover: Kansas C. C. U. S. No. 1382. The State of Kansas *ex rel.* J. F. Tufts, assistant attorney general of the State of Kansas for Atchison county, Kansas, appellant, *vs.* Herman Ziebold & Joseph Hagelin, partners as Ziebold & Hagelin. Filed April 25, 1887.

123-623

Office Supreme Court U. S.
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APR 28 1887
JAMES H. McKENNEY.
CLERK.

IN THE SUPREME COURT
OF THE UNITED STATES.

THE STATE OF KANSAS, ON THE RELATION OF J. F. TUFTS, ASSISTANT ATTORNEY GENERAL OF THE STATE OF KANSAS FOR ATCHISON COUNTY, *Appellant*,

vs.

HERMAN ZIEBOLD AND JOSEPH HAGELIN, PARTNERS AS ZIEBOLD & HAGELIN, *Appellees*.

BRIEF FOR THE STATE.

S. B. BRADFORD,
Attorney General of the State of Kansas.

OF COUNSEL:
EDWIN A. AUSTIN,
Assistant Attorney General.
J. F. TUFTS,
Asst. Attorney General for Atchison County, Kas.

BAKER PUBLISHING HOUSE, TOPEKA, KANSAS.

IN THE

Supreme Court of the United States.

THE STATE OF KANSAS, ON THE RELATION OF J. F. TUFTS, ASSISTANT ATTORNEY GENERAL, PLAINTIFFS,

vs.

ZIEBOLD & HAGELIN, DEFENDANTS.

REASONS FOR ADVANCEMENT.

This is a civil case, commenced in the district court of Atchison county, Kansas, in the name of the assistant attorney general of that county, to abate an alleged nuisance, to wit, a place where intoxicating liquors are bartered, sold, and given away, and are kept for barter, sale, and gift, in violation of law, and a place where intoxicating liquors are manufactured for barter, sale, and gift, *in the State of Kansas*, and to perpetually enjoin the defendants from using or permitting to be used the premises described in the petition for the purposes mentioned in violation of the prohibitory law of the State of Kansas. The defendants filed a bond and petition for removal to the circuit court of the United States, alleging that the law under which this proceeding was instituted was in conflict with the provisions of the Constitution of the United States, and especially Article 4 of the Constitution, and Section One of Article 14 of the Constitution.

The premises which are alleged to be a nuisance is a group of buildings owned and used by the defendants as a brewery in the manufacture of beer.

The defendants allege that at the time they purchased and erected these various buildings, the laws of the State of Kansas permitted the manufacture of beer and intoxicating liquors without any restrictions. That the property was useless for any other purpose than that for which they were constructed, to wit, the manufacture of beer and other intoxicating liquors, and that if enjoined from prosecuting that business they would suffer a total loss of the value of the buildings, for which destruction of value and property, the law in question makes no compensation nor method of obtaining compensation. A petition and bond for a removal was filed in the State court, and the application refused by that court, and an order of injunction granted.

Notwithstanding this opinion denying the motion for removal, the defendants filed a transcript of the record in the circuit court, and on a plea in abatement, which is contained in the record filed in this Court, the circuit court adhered to its opinion and retained the case for hearing, and by reason of the position taken in that opinion, on final hearing on bill and answer, denied the relief prayed for in the bill and dismissed it.

There are a large number of cases in the State and Federal courts of Iowa and Kansas which are dependent upon the question which arises in this cause, and a direct conflict exists between the rulings of the two courts on the question. It is, therefore, a matter of exceedingly important public interest that a speedy determination by this honorable Court be had.

The police regulations of the State of Kansas and of the State of Iowa, regulating the manufacture and traffic of intoxicating liquors and their proper enforcement, will remain unsettled until the decision on this question and the operations of government thereby greatly embarrassed, while the private interests of brewers and manufacturers in these several States, aggregating many thousand dollars in value, likewise remain in doubt.

S. B. BRADFORD,
Att'y General and Solicitor for Appellants.

ENNIS & WAGGONER
and TOMLINSON & EATON,
Solicitors for Appellees.

IN THE SUPREME COURT
OF THE UNITED STATES.

THE STATE OF KANSAS, ON THE RELATION OF J. F. TUFTS, ASSISTANT ATTORNEY GENERAL OF THE STATE OF KANSAS FOR ATCHISON COUNTY, *Appellant*,

vs.

HERMAN ZIEBOLD AND JOSEPH HAGELIN, PARTNERS AS ZIEBOLD & HAGELIN, *Appellees.*

BRIEF FOR THE STATE.

STATEMENT.

THIS is a civil case, commenced in the District Court of Atchison county, Kansas, in the name of the State, by the Assistant Attorney General for that county, to abate an alleged nuisance, to wit, a place where intoxicating liquors are bartered, sold, and given away, and are kept for barter, sale and gift, in violation of law, and a place where intoxicating liquors are manufactured for barter, sale and gift, in the State of Kansas, and to perpetually enjoin the defendants from using or permitting to be used the premises described in the petition for the purposes mentioned, in violation of the prohibitory law of the State of Kansas. The defendants filed with the clerk of the district court a bond and petition for removal to the Circuit Court of the United States; and on the

hearing of said petition, the same was overruled by the judge of the district court, and the cases held for trial.

The defendants, however, filed in said court transcript of the record in the case, and the same was docketed in said court as pending therein.

The State filed a verified plea in abatement and to the jurisdiction of the court, controverting the facts alleged in the petition for the removal as the grounds of such removal.

To this plea the defendants filed an answer, (replication?) and upon the issue joined on the plea by such answer, the cause was submitted to the court.

By agreement the proofs of the parties, plaintiff and defendant, were made by affidavits, all objections being waived, and no question being raised on either side as to the proper practice of taking proof on such an issue.

Upon the hearing of the plea in abatement, it appearing that the answers to said pleas were not verified, it was agreed that each of said pleas should be considered as denied, only in so far as the same were denied in the affidavits filed for the defense in said case.

It was also admitted that no application for a permit to sell or manufacture liquor on the premises described in the petition, the selling or manufacturing of which was sought to be enjoined, had ever been made by either of the defendants under the law.

It was also agreed that upon the evidence offered upon said hearing, the said judge should consider, adjudge and issue such order of injunction, if any, as ought to be issued in said case, provided the said case was retained in that court.

The court overruled the plea in abatement, holding the case for hearing in the Circuit Court. Afterwards the complainant and appellant filed an amended and recast bill, alleg-

ing and praying as in the original petition in the State court, but framed according to the equity pleadings. This amended and recast bill contains, in addition to the allegations in the original bill, substantially these three following propositions:

First: That all rights, interests, estate and title in and to said premises vested in said defendants, were acquired with a full knowledge that all places where intoxicating liquors are sold in violation of law, were by the statutes of said State of Kansas declared to be a common nuisance, and directed to be shut up and abated as public nuisances.

Second: That none of the malt, vinous, spirituous, fermented or other intoxicating liquors now in possession of said defendants on said premises, the barter, sale or gift of which in violation of the laws of the State of Kansas is sought to be enjoined in this action, were in existence prior to the adoption of said constitutional amendment, and the enactment of said acts by the Legislature of the State of Kansas.

Third: That at the time said defendants erected the buildings and the appurtenances on the premises described in plaintiff's petition, and at the time said defendants acquired their present rights, interests, estate and title to said premises, the sale, barter and giving away of spirituous, vinous, fermented or other intoxicating liquors, without first taking out and having a license or permit, was prohibited by the laws of said State, punished by fine and imprisonment, and all places where such liquors were sold or given away in violation of law were declared to be common nuisances, and directed to be shut up and abated as such.

These propositions were also contained in the plea in abatement. In addition to these allegations, and as a part of the bill, there were annexed full copies of the laws of the State of Kansas, which authorize these proceedings, and also the law

upon which the first and third of the foregoing propositions are based.

The defendants filed their answer to said amended and recast bill, alleging that at the time they purchased and erected the buildings and premises described in the bill, the laws of the State of Kansas permitted the manufacture of beer and intoxicating liquors without any restrictions. That said buildings and premises were erected for that especial purpose; and that said property was useless for any other purpose than that for which they were constructed, to wit, the manufacture of beer and other intoxicating liquors, and if enjoined from prosecuting that particular business they would suffer a total loss of the value of the buildings.

That the law under which this prosecution was instituted was void and unconstitutional, and the provisions thereof were in violation of and in contravention to the provisions of article 4 and section 1 of article 14 of the amendments to the constitution of the United States.

On Thursday, February 10th, 1887, at the November term 1886, this cause being submitted on bill and answer, a final decree was made and pronounced in the cause, wherein it was in substance adjudged and decreed that the complainant and appellant, the State of Kansas, on the relation of J. F. Tufts, Assistant Attorney General of the State of Kansas for Atchison county, Kansas, was not entitled to the relief prayed for, and dismissing said bill at the cost of said complainant and appellant. The complainant then brought this appeal to this court.

ASSIGNMENT OF ERRORS.

The complainant and appellant assigns as error, and asks for a reversal upon the following rulings of the court below:

First: That the court below erred in overruling the plea in

abatement to the jurisdiction of the court, and in holding the case for hearing.

Second: That the court below erred in rendering a final decree on the bill and answer for the defendants, and dismissing complainant's bill.

THE PROPOSITION INVOLVED.

The propositions involved in the record under these two assignments of error are substantially the same. The plea contains one paragraph that is not repeated in the allegations of the amended bill, or admitted in the answer, *i. e.*, that the said defendants are not by this proceeding deprived of the free and unrestricted use and enjoyment of the premises for the purpose of preparing and manufacturing beer for other markets, and for barter, sale and gift in other States. That the premises described in plaintiff's petition, and the buildings thereon and machinery therein, are as valuable for such purposes of manufacturing for sale in such other States and countries as if used for the purposes of manufacturing for sale, barter and gift in this State.

Upon these allegations we argue that under the issue submitted on this plea in abatement, and under the proof made by the defendants, there being no negative in the affidavits of these allegations, that they should be taken as true and uncontroverted.

The rights protected by the fourteenth amendment are not rights which individuals have as citizens of States, but they are such rights as they have as citizens of the United States.

If the property used by the defendants is of undiminished value if used for the purpose of manufacturing for barter, sale and gift in other parts of the sovereignty of the United States, and if by these proceedings the defendants are not restricted in the use and enjoyment of these premises for such

purposes, then they are not deprived of their property, or of the use of it, or of any value within the guarantee of the fourteenth amendment.

That they are restrained from selling and manufacturing for sale in a very small portion of the United States—a restraint which, although it cuts them off from the neighboring markets, leaves free from all other portions of the United States, and which does not diminish the value of the property referred to, when used for such purpose of manufacturing for sale in other States, surely does not infringe upon the guarantee of the fourteenth amendment.

In support of this proposition is cited the case of *Presser v. Illinois*, 116 U. S., 252. The contention in that case was that the sections of the military code of Illinois under which he was indicted was an invasion of that clause of the first section of the fourteenth amendment to the constitution of the United States, which declares that "no State shall make "or enforce any law which shall abridge the privileges or im- "munities of citizens of the United States." And in the opinion this court says, speaking by Mr. Justice WOODS: "It "is only the privileges and immunities of citizens of the United "States that the clause relied on was intended to protect. A "state may pass laws to regulate the privileges and immunities "of its own citizens, provided that in so doing it does not "abridge their privileges and immunities as citizens of the "United States."

If this is true with reference to that clause of the first section of the fourteenth amendment, it is true of the later clause in that section. But irrespective of this question, the proposition involved in the issue as that submitted on the bill and answer is the same as that submitted on the plea in abatement.

It is admitted that the premises described in the original

petition in the State court and in the amended bill was a place where intoxicating liquors were sold, bartered or given away, and kept for barter, sale and gift otherwise than by authority of law, and were manufactured for barter, sale and gift in the State of Kansas; and it is admitted that the defendants are the owners and keepers of such place. It is admitted that all the rights, interest, estate and title in and to said premises vested in said defendants, were acquired with full knowledge that all places where intoxicating liquors are sold in violation of law, were by the statutes of the State of Kansas declared to be common nuisances and directed to be shut up and abated as public nuisances. It is admitted that none of the intoxicating liquors now in possession of said defendants, the barter, sale or gift of which in violation of law is sought to be enjoined, were in existence prior to the adoption of the constitutional amendment and the prohibitory legislation in furtherance thereof.

By the affidavits of the defendants in opposition to the plea, and by their answer to the amended bill, it appears that the defendants purchased the property in 1871; that the property was erected for the purpose of, and was at the time of the purchase used for manufacturing, making, and brewing beer, and that the defendants purchased it for that purpose, and for no other purpose, and have since carried on the business of making, brewing and manufacturing beer continuously. That the property was then worth and of the value of $25,000. That they have since erected additional buildings, purchased machinery, and made improvements, making the total property worth and of the value of $54,175. That at the time they made the purchase and improvements, the laws of the State of Kansas permitted and allowed the making and manufacturing of beer, and that such business was lawful. That

the buildings were valuable and suitable for no other business whatever; and that if they were prohibited and enjoined from making, manufacturing and brewing beer therein, the said property would not be worth to exceed from three to five thousand dollars. That the law under which this proceeding is prosecuted is class legislation, and abridges the privileges and immunities of the defendants as citizens of the State of Kansas, and as citizens of the United States, and that its enforcement would deprive said defendants of their property without due process of law, and deny to said defendants equal protection of the law, and subject said defendants to unreasonable search, and their property to unreasonable seizure or destruction without probable cause therefor; and that said laws are void and in conflict with, or in contravention to, article 4 and section 1 of article 14 of the amendments of the constitution of the United States.

The claim that this law is in violation of the fourth amendment to the constitution, may be passed with the following extract from the opinion of the judge of a district court of the State, in refusing a removal in this cause:

"It is a part of the constitutional history of this country, that the ten amendments to the Federal Constitution, numbered 1 to 10 inclusive, which were submitted to the States for ratification by the first Congress at its first session, were intended as limitations upon the powers of the Federal Government, and not as restrictions upon the authority of the States; and as a result, no State statute can be held null and void by any court, State or Federal, on account of a supposed conflict with these amendments, or any of them. Article 4, which is quoted in the petition for removal, and which relates to unreasonable searches and seizures, may therefore be dismissed from our consideration."

Barron v. The Mayor and City Council of Baltimore, 7 Pet. 243.
Livingston's Lessee v. Moore, 7 Pet. 469, 551, 552.
Fox v. State of Ohio, 5 How. 410, 434, 435.
Smith v. State of Maryland, 18 How. 71, 76.
Twitchell v. The Commonwealth, 7 Wall. 321, 325, 326.
United States v. Cruikshank, 92 U. S. 542, 552.

The remaining question is, whether this legislation is in violation of the fourteenth amendment as taking property

without due process of law; and the proposition involved in this question is, whether, where a citizen of a state purchases property and makes improvements thereon adapted to a particular private business, which is then free from taxes, licenses or other restrictions, but which the legislature afterwards concludes to be detrimental to the public morals, the state can prohibit or regulate the use of that property for the purpose for which it was designated, adapted and valuable, without making compensation; whether such a prohibition or regulation without compensation would operate to deprive such person of his property without due process of law within the provisions of the fourteenth amendment.

ARGUMENT.

1. The proposition presented in this case falls within the rule laid down by this court in *Beer Company v. Massachusetts*, 97 U. S. 25; *Fertilizing Company v. Hyde Park*, 97 U. S. 659; *Stone v. Mississippi*, 101 U. S. 814, and *Butchers' Union Co. v. Crescent City Live-Stock Landing Co.*, 111 U. S. 746.

2. The vested rights here claimed to be invaded, rest not as in the cases above cited, upon express legislative authority to engage in the particular private business, in pursuance of which authority the defendants in those cases had made large expenditures and outlays which would be lost or damaged by a withdrawal of such authority, but it rests upon negation. At the time of the purchase of the premises and the making of the improvements, the manufacture of intoxicating liquor was free from tax, license, or other restrictions. The sale of such liquors has always been under regulation and restraint, and places where such liquor is kept for sale in violation of law, have always been declared to be common nuisances. But upon the manufacture of intoxicating liquor, the statutes of

this State were silent until the enactment of the laws of 1881 and 1885, set out in the record as exhibits to the bill.

In the absence of all legislation, the defendants acquired their property and made the improvements thereon. To hold that these defendants had a right to continue the obnoxious use of these premises, which the Legislature has determined to be detrimental to the public morals, until compensation is made, would be to hold that there is, because of the absence of restrictive legislation while the improvements were being made, an implied contract right vested in them that the State would never interfere with them if they made improvements adapted to this particular business, and that it would never prohibit them from using or regulate the use of the property for the manufacture of beer, whether detrimental to the public morals or not.

3. In the cases cited, the Supreme Court says that no express contract of this kind can be made; that those defendants obtained no vested rights by reason of the legislative acts they relied on, and the valuable improvements they had made; that one legislature cannot so limit the discretion of its successors that they may not enact such laws as are necessary to protect the public health or morals; that statutory authority given by the State to corporations or individuals to engage in a particular private business attended with results that are detrimental to the public morals, while it protects them for the time against public prosecutions does not constitute a contract preventing the withdrawal of such authority.

4. *The Butchers' Union Co. v. The Crescent City Co.*, 111 U. S. 746, the last of those cited, is explicit. The Crescent City Co., by the act of the Legislature of Louisiana—which was assailed in the Slaughter-House cases, and there upheld, (16 Wall. 36)—was given an exclusive right for twenty-five

years, but in 1879 the monopoly features in this charter were, by article 258 of the constitution, adopted that year, abolished; and the Butchers' Union Co., availing themselves of this repeal, entered upon the business, or were about to do so. The Crescent City Co., on the allegations that the constitutional provisions of 1879, and the subsequent ordinances of the city, were a violation of their contract with the State under the act of 1869, brought the suit reported to obtain an injunction forbidding the Butchers' Union Co. from exercising the business.

In the opinion, the court says:

"No one can examine the provisions of the act of 1869 with a knowledge that they were accepted by the Crescent City Co., and so far acted on that a very large amount of money was expended in a vast slaughter-house, and an equally extensive stock-yard and landing-place, and hesitate to pronounce that in form they have all the elements of a contract on sufficient consideration.

"It admits of as little doubt that the ordinance of the city of New Orleans, under the new constitution, impaired the supposed obligation imposed by those provisions on the State, by taking the exclusive right of the company granted to it for twenty-five years, which was to the company the most valuable thing supposed to be secured to it by the statutory contract."

And the court further says:

"While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime.

"It cannot be permitted that, when a constitution of a State, the fundamental law of the land, has imposed upon its legislature the duty of guarding, by suitable laws, the health of its citizens, especially in crowded cities, and the protection of their person and property by suppressing and preventing crime, that the power which enables it to perform this duty can be sold, bargained away, under any circumstances, as if it were a mere privilege which the legislator could dispose of at his pleasure."

And in a still later case the Supreme Court of the United

States formulates the principle upon which the Beer Company case, the Fertilizing Company case, the Lottery case, and this later Slaughter-House case, depend.

In the *New Orleans Gas Co. v. The Louisiana Light Co.*, 115 U. S. 650, Mr. Justice HARLAN, delivering the opinion of the court, after discussing each of these cases separately, uses the following language:

"The principle upon which the decisions in *Beer Co. v. Massachusetts*, *Fertilizing Co. v. Hyde Park*, *Stone v. Mississippi*, and *Butchers' Union Co. v. Crescent City Live-Stock Landing Co.*, rest, is that one legislature cannot so limit the discretion of its successors that they may not enact such laws as are necessary to protect the public health or the public morals. That principle, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of those cases, that statutory authority given by the State to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others."

5. Can it be possible that that which "cannot be sold, bar-"gained away under any circumstances, as if it were a mere "privilege which the legislator could dispose of at his pleas-"ure," can be surreptitiously lost?—that by mere silence and inaction in its legislators the State can be deprived of the power that cannot be bargained away?—that by simply putting up a brewery and the expenditure of a few thousand dollars, these defendants can forestall legislation and fasten upon the community the endurance of a decidedly obnoxious business, while they could not have obtained such right by express grant?

6. It appears in the *Butchers' Union Co. v. Crescent City Co.* case, that, relying on what the defendant supposed to be a contract, it had invested large amounts of money in buildings, apparatus, etc., which were adapted to the particular kind of private business which said company was authorized by express legislative action to conduct.

This court did not hesitate to pronounce that in form there existed all the elements of a contract on sufficient considera tion.

Contract rights are property in which corporations and individuals may obtain vested rights the same as they may in any other species of property. Contract rights upon which persons have acted, are as much within the protection of the fourteenth amendment, that no State shall deprive any person of his property without due process of law, as within the provision that no State shall impair the obligation of a contract. They are as much within the protection of the fourteenth amendment as any other species of property. The Crescent City Company's property was the exclusive right granted to it for twenty-five years, which the Supreme Court says was the most valuable thing supposed to be secured to it by the legislative contract. Under this contract that company had made large expenditures. An act which at once destroyed the value of all this property, surely would deprive that company of its property without due process of law, equally with the legislation challenged in this case, yet this court says that the Legislature can make no such contract; that those defendants obtained no vested rights by reason of the legislative acts they relied on, and the valuable improvements they had made. That one legislature cannot so limit the discretion of its successors that they may not enact such laws as are necessary to protect the public health or public morals. That the statutory authority given by the State to corporations or individuals to engage in a particular private business attended with results that are detrimental to the public morals, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority.

The defendants' property which they claim they are de-

prived of without due process of law, is the use of the premises described in the bill, for a certain purpose. The property, except for this particular use, is not interfered with. There was no express legislative authority granted them to engage in this particular business, but their vested rights, if they have any, are because they have made the improvements in the absence of any legislative authority. Through the absence of any legislation, the defendants raise up vested rights—property—of which they claim they are deprived without due process of law, by the prohibitory legislation under which this proceeding is prosecuted. But if the Crescent City Company obtained no vested rights in the contracts supposed to have been secured by express legislation, can it be said that these defendants secured a vested right to carry on a particular private business detrimental to the public health or public morals, because of the absence of any legislation on the subject?

Can there be any vested right in the use of the defendants' property as a brewery for the manufacture of beer, which is more sacred than the contract rights of the defendants in the cases decided by the Supreme Court?

7. Judge DILLON, in his work on Municipal Corporations, (p. 136,) says:

"But it may here be observed that every citizen holds his property subject to the proper exercise of this power. . . . And it is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner, and that the sovereign authority may by police regulations so direct the use of it that it shall not prove pernicious to his neighbors or the citizens generally. . . . It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner. . . . That among these police powers is the right of the State to regulate, prohibit and suppress the liquor traffic, has not been doubted in this country since the license case of 5 Howard, 504.

"If the public safety, or the public morals, require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of state." (*Beer Company v. Massachusetts*, 97 U. S. 25.)

In Tiedeman on Limitations of the Police Power, a strongly biased work against a liberal construction of that power, it is said:

"The reasonable enjoyment of one's real estate is certainly a vested right, which cannot be interfered with or limited arbitrarily. The constitutional guarantee of protection for all private property extends equally to the enjoyment and the possession of lands. An arbitrary interference by the Government, or by its authority, with the reasonable enjoyment of private lands, is a taking of private property without due process of law, which is prohibited by the constitution. But it is not every use which comes within this constitutional protection. One has a vested right to only a reasonable use of one's lands. It is not difficult to find the rule which determines the limitations upon the lawful ways or manner of using lands. It is the rule which furnishes the solution of every problem in the law of police power, and which is comprehended in the legal maxim, *Sic utere tuo, ut alienum non lædas.* One can lawfully make use of his property only in such a manner as that he will not injure another. Any use of one's lands to the hurt of another is a nuisance, and may be prohibited. At common law, that is a nuisance which causes personal discomfort or injury to health to an unusual degree. As it has been expressed in a preceding section, the right to personal security against acts which will cause injury to health or great bodily discomfort, cannot be made absolute in organized society. It must yield to the reasonable demands of trade, commerce, and other great interests of society." (Sec. 122.)

And in the same section it is further said:

"Granting that the act or trade produces discomfort or injury to health, it is ultimately a legislative question whether the public welfare requires the imposition of this burden. No one has a natural right to do that which injures another. If the law permits him to do this it is a privilege, which may be revoked at any time by the proper authority. The police power of the government is reposed in the legislature. It is quite a common experience for the legislature, either to prohibit altogether, or to regulate the doing of that which works an annoyance or injury to others."

And further in the succeeding section:

"It is clearly within the legislative discretion to determine whether the private interest or the public good shall yield in a case where the

two are antagonistic, and to prohibit or permit the doing of what promotes the public welfare and at the same time causes personal discomfort or injury, and its judgment cannot be subjected to a review by the courts. The courts cannot reverse the legislative decree in such a case; it is not in any sense a judicial question. But the police power of the legislature, in reference to the prohibition of nuisances, is limited to the prohibition or regulation of those acts which injure or otherwise interfere with the rights of others." (Sec. 122a.)

The language of KENT, in 2 Kent Com. 340, is:

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of gunpowder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of the dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community."

The *People v. Hawley*, 3 Mich. 330, is a case that was almost identical with this case:

"It was an action brought to recover of the defendant the penalties imposed by the act approved February 12, 1853, entitled 'An act prohibiting the manufacture of intoxicating beverages, and the traffic therein.' By the case agreed upon by the counsel of the parties, the defendant, on the 22d of December, 1853, and since the first day of said month, was and had been a manufacturer of strong beer and ale, and also a seller thereof, in the city of Detroit. He had been engaged in the business of brewing malt liquors, consisting of ale and strong beer, in the city of Detroit, since 1843. On the 23d of December, 1853, and on the first day of the same month, he had on hand ale manufactured in Detroit previous to that time, to the value of more than $1,200, and trade fixtures to the amount of more than $15,000, put up expressly for the brewing business, and not susceptible of use for any other purposes, for which, or for the use thereof, no compensation had been made or tendered him. The defendant on the 24th of January, 1853, at Detroit, entered into a written agreement with a firm of Chicago, whereby he agreed to sell and forward to said firm at Chicago, from Detroit, all quantities of malt liquors which said firm might need in their business for five years thereafter, which contract had remained in force since its date.

"In pursuance of said contract, the defendant, on the 2d of December, 1853, at Detroit, sold and forwarded to the other party thereto, liquors, and it was admitted that he intended to manufacture and sell, and was manufacturing, ale and strong beer of the same kind, under his contract."

And in the decision of that case, the court says:

"It is urged by the counsel for the defendant that, having a large investment of money in buildings and fixtures connected with his business of brewing ale and strong beer, which are useless for any other purpose, the Legislature cannot deprive him of the use of his said property for the purpose for which it was designed, without providing compensation for his buildings and fixtures. But we negative this assumption. In the exercise of its police power, a State has full power to prohibit, under penalties, the exercise of any trade or employment which is found to be hazardous or injurious to its citizens, and destructive of the best interests of society, without providing compensation to those upon whom the prohibition operates.

"The same principle applies to the position assumed by the defendants in reference to this contract. The law does not operate directly upon the contract, and therefore it is not within the prohibition of the constitution of the United States or of this State. Indeed, the defendant stands in a very singular attitude. By similar means any man might forestall legislation, and fasten upon any community the endurance of the presence of the most decidedly hazardous occupation for an indefinite number of years."

It is stated in *Commonwealth v. Tewksbury*, 11 Metcalf, 55:

"All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal right of others, or to destroy or greatly impair the public interests of the community. . . . It is competent for the legislature to interpose, and by positive enactment to prohibit a use of property which would be injurious to the public. . . . And that such law is not a taking of the property for public use, within the meaning of the constitution, but it is a just and legitimate exercise of the power of the legislature to regulate and restrain such particular use of property as would be inconsistent with or injurious to the rights of the public."

To hold otherwise would be destructive to all social organization. As was said in *Coates v. Mayor of New York*, 7 Cowen, 585:

"Nuisances might, and undoubtedly would be, multiplied to an intolerable extent. Nor can it make any difference that the right is purchased previous to the passage of the by-law, or before it becomes necessary. These laws are usually enacted with a view to evils already existing. Till the state of things is such as to render the act complained of a nuisance upon actual experiment, no law is passed. Every right, from an absolute ownership in property, down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others. Though at the time it be remote and

inoffensive, the purchaser is bound to know, at his peril, that it may become otherwise by the residence of many people in its vicinity, and that it must yield to by-laws or other regular remedies for the suppression of nuisances."

In *Commonwealth v. Intoxicating Liquors,* 115 Mass. 153, (*Beer Co. v. Mass.*, 97 U. S.,) the following language appears in the opinion:

"By its charter, the claimant is a private manufacturing corporation, with the same power as a natural person to do that which its charter authorized; and by implication with the same power as an individual to deal with and sell its property so manufactured. But the authority of the legislature over the property or the use of the property of a corporation is not lost because no power is reserved to repeal or amend its charter. Any laws the sovereign power may find it necessary or salutary to enact, regulating, controlling, restricting or prohibiting the sale of a particular kind of property for the general benefit, apply as well to the property of corporations, like the claimant, as to individuals. Such laws are in the nature of police regulations, and individuals and corporations are alike subject to them. Indeed, all property is held subject to such restrictions, and it is immaterial that the restriction is imposed after the property is acquired or becomes valuable, or after the charter is granted, or before it becomes necessary, in the judgment of the legislature, to pass a law on the subject. Every such law limits, restrains, impairs, and in some cases destroys the uses, which were previously enjoyed, of the property so made the subject of legislation, but the extent to which it may do so does not affect the validity of such laws, or their equal application to all owners of such property. They are presumed to be passed for the common good, and to be necessary for the protection of the public, and cannot be said to impair any right, or the obligation of any contract, or to do any injury in the proper and legal sense of these terms. (*Commonwealth v. Alger*, 7 Cush. 85, 86; *Thorpe v. Rutland & Burlington Railroad*, 27 Vt. 140; *People v. Hawley*, 3 Mich. 330; *Brick Presbyterian Church v. New York*, 7 Cowen, 538; *Vanderbilt v. Adams*, 7 Cowen, 349; *Coates v. New York*, 7 Cowen, 585, 604, 606.)"

In *City of St. Louis v. Stern*, 3 Mo. App. 48, the court uses the following language:

"The right to compensation on account of private property taken for public uses is foreign to the subject of preventing or abating nuisances. A regulation which compels a man so to use his own as not to interfere with the rights of others, does not therefore deprive him of his property, nor does it devote such property to any public use. As a member of the community he is considered, moreover, to be him-

self benefited by that which restrains him from committing injury upon the public at large. In the present case the defendants were not required to surrender the property upon which their pens were located. They were simply required to discontinue such a use of it as continually violated the natural and legal rights of others—rights fully as dear to them, and as much entitled to protection by the State, as any that the defendants could assert."

In Bishop on Statutory Crimes, (sec. 995,) that author says:

"The doctrine governing this whole subject may be summed us thus: The State, in the enactment of its law, must exercise its judgment concerning what acts tend to corrupt the public morals, impoverish the community, disturb public repose, injure the other public interests, or even impair the comfort of individual members over whom its protecting watch and care are required. And the power to judge of this question is necessarily reposed alone in the legislature, from whose decision no appeal can be taken directly or indirectly to any other department of the government. When, therefore, the legislature with this exclusive authority has exercised its right of judging concerning this legislative question, by the enactment of prohibitions like those discussed in this chapter, all other departments of the government are bound by the question which no court has a jurisdiction to review. And the question of the wisdom of the enactment is definitely settled by the enactment itself."

And again in section 564:

"No one contends that it is not competent for legislation to forbid any improper use of fists, by those who possess them. As, that a man shall not give to his neighbors, with his fists, black eyes and the like. But it is urged by many that though legislation may properly give direction to the action of the bodily members of a man, it cannot thus restrain the use of his property. In reason, however, and according to established legal doctrine, the property is as much within legislative control as the person."

And in *State v. Mugler*, 29 Kas. 252, the prohibitory liquor law of 1881 was directly passed upon by the Supreme Court of Kansas. The opinion is given in full:

VALENTINE, J.: The defendant, Peter Mugler, was prosecuted criminally, in two different cases, for violations of the prohibitory law. In the first case, the indictment contained but one count, charging that the defendant "did unlawfully manufacture and aid, assist and abet in the manufacture" of certain intoxicating liquors. In the second case, the indictment contained six counts, in the first five of which it charged

that the defendant, on five different days, sold intoxicating liquors in violation of law; and in the sixth count it charged that the defendant was guilty of keeping and maintaining a common nuisance, by keeping for sale and selling certain intoxicating liquors. In the first case, a motion was made by the defendant to quash the indictment, for the reason that it did not state facts sufficient to constitute any offense, and because it contained a double charge against the defendant. This motion was overruled by the court. A trial was then had in the case, before the court without a jury, upon an agreed statement of facts, which admitted that the defendant, since October 1, 1881, without a permit, manufactured beer, an intoxicating liquor, in a brewery erected by him in Salina, Kansas, in 1877, and used thereafter by him as a brewery up to May 1, 1881, the time when the present prohibitory liquor law went into effect; "that said brewery was at all times after its completion, and on May 1, 1881, worth the sum of $10,000 for use in the manufacture of said beer, and is not worth to exceed the sum of $2,500 for any other purpose." It was also admitted that the defendant used his brewery for the manufacture of beer after October 1, 1881, the same as he had done prior to May 1, 1881. In the second case, motions to quash the indictment, and to compel the prosecution to elect upon which count it would proceed, were made by the defendant, and were overruled by the court. A trial was then had in the second case, before the court without a jury, upon an agreed statement of facts, which admitted that the sale charged in the first count of the indictment was made by the defendant, without a permit, and that it was a sale of beer manufactured by the defendant before the passage of the prohibitory act of 1881; but whether the beer thus sold was manufactured before the adoption of the constitutional amendment, in November, 1880, prohibiting the manufacture and sale of intoxicating liquors, except for medical, scientific and mechanical purposes, the record is silent; and for what purpose the beer was sold, the record is also silent. In each of these two cases the defendant was found guilty and fined $100, and in each he now appeals to this court.

The principal question supposed to be involved in these two cases is as follows: Is or is not the present prohibitory liquor law constitutional, so far as it affects the defendant and his business in manufacturing beer at his brewery, and selling the same? The defendant claims that such law is unconstitutional, and his counsel make a very able and elaborate argument in this court to show that it is unconstitutional. Among other things they say:

"Years prior to the enactment of the law, and even before the prohibition amendment to the constitution was discussed, the defendant erected his brewery and furnished it with the means necessary for the manufacture of beer, the subject of the charge in the indictment. When the amendment was adopted, and when the act for its enforcement became a law, the defendant's money was thus invested, and his brewery was his 'property.' The effect of the act is to close the doors of his business, and leave what had been valuable property, recognized and protected by the law, lifeless, unremunerative, and almost worthless, as it idly rests under the condemnation of the new

departure. By a simple legislative edict, the defendant is stripped of $7,500 in value of property, as effectually as if consumed by fire.

"In this he is deprived of property without due process of law, in violation of fundamental principles of government, and of the fourteenth article of the amendment to the constitution of the United States, which provides: 'Nor shall any State deprive any person of life, liberty, or property, without due process of law.' . . .

"The defendant is deprived of his property by mere force of the legislative decree. No rule is established or course prescribed by which his rights are in any way to be considered. The legislature finds him in the enjoyment of property, which public policy in this State has never even subjected to any police regulation, nor placed in any way under the surveillance of the law. It simply says to him: 'This business which you have built up under the protection of the law, and which to this time has not been held to infringe upon public rights in any way, is henceforth condemned as a nuisance, and the value of your property confiscated for the public good.' There is no notice, no hearing, no opportunity for redress; nothing is heard but this inexorable decree of annihilation, and the defendant sits in the midst of the ruins of that which years of toil had accumulated, under the vain hope that he had security under the law."

Much that counsel say, we think has force. The legislature has probably gone a long way in destroying the values of such kind of property as the defendant owned, and has possible gone to the utmost verge of constitutional authority. And yet we do not think that the result reached by counsel for the defendant necessarily follows from the facts and circumstances of this case. The defendant is certainly not deprived of his brewery, or of his liquor, or of any of his other tangible property. So far as the constitutional amendment and the prohibition act are concerned, he still retains his brewery and his liquors, and all his other tangible property, just the same as he did prior to the passage or adoption of any of the present restrictive or prohibitory laws. But probably it is not his tangible property which he claims has thus been taken or destroyed or confiscated. It is his intangible property, his vested rights, founded upon or incidental to the rightful enjoyment, or use, of his visible and tangible property, of which he claims to have been deprived. This brings us to a comparison between the former restrictive and prohibitory liquor laws of this State, and the present restrictive and prohibitory liquor laws. In 1877, when the defendant erected his brewery, he had a right to manufacture all the beer or other intoxicating liquors which he chose; and he can do so still, provided he first obtains a permit therefor from the probate judge, and he can easily obtain the permit by complying with the terms and conditions upon which permits are issued. At that time he could manufacture intoxicating liquors for any purpose which he chose; but since the adoption of the constitutional amendment, in November, 1880, he can manufacture such liquors only for medical, scientific and mechanical purposes. His right to sell intoxicating liquors, however, was always restricted. In 1877, under the then existing laws, he had no right to sell his beer or any other intoxicating liquor in any quantity, or in any place in Kansas, or to any person, unless he had first obtained a license therefor; (*The State v. Volmer*, 6 Kas. 371; *Dolson v. Hope*, 7 Kas. 161; *Alexander v. O'Donnell*, 12 Kas. 608;) and such is still the law. The

license is now called a "permit." But even with a license, the defendant had no right under the old laws to sell his beer on Sundays, or on election days, or on the Fourths of July; or to any person who was in the habit of becoming intoxicated, against the known wishes of his wife, child, parent, brother, or sister; or to any minor, against the consent of his parent or guardian; or at any place except the place designated in his license, which in the present case would have been in the city of Salina. Besides, the defendant had no assurance under the old laws that he could procure a license. Licenses were not granted to anybody and everybody, but only to a select few, and then the license would continue in force for the period of one year only, and no person could have any assurance that his license would be renewed. Both the issuing and renewal of licenses depended entirely upon the temper and disposition of the community in which the application was made. Under the old laws each community was given the privilege of determining for itself whether licenses to sell intoxicating liquors should be issued or not, and if none were issued, then the old law was as much a prohibition law as the present liquor law. The old law might properly be called not only a license law, but also an option law, and a contingent prohibition law—for licenses were allowed to be issued at the option of each community; and if they were not issued the law would become a virtual prohibition law. Under the old law the entire State might have become a complete prohibition state, at the option of its several communities, or each community might have authorized the issue of licenses, as it chose. In this respect the old law and the present law differ. The old law left the question of prohibition or license with each community separately and exclusively, while the present law theoretically enforces prohibition upon all communities, whether they are willing or unwilling. We do not here wish to be understood as saying that our present liquor, or any liquor law which we have ever had in Kansas, is or has been an absolute and unqualified prohibitory liquor law. They have none of them been more than limited and qualified prohibition laws. Under the old law, the defendant, with a license, could sell his beer to any person and to all persons, with the exceptions heretofore mentioned; but under the present law, we suppose he is subject to at least one other restriction in his sales as to persons. He cannot now sell his beer for medical purposes, except to druggists. It would seem, however, that with a permit he may now sell his beer for scientific and mechanical purposes, to any and every person who might wish to purchase the same. And therefore it would seem that in this respect no additional restrictions over the old law are imposed. We think it will now appear that the old law and the new are not so vastly different as has been by some persons supposed. Both are restrictive in their character; both are criminal laws, and both are prohibitory to some extent; and yet neither is absolutely and unqualifiedly a prohibition statute. Both restrict sales as to times, places and persons, and the present law as to purposes; and yet both laws allow sales to be made. Under the old

law, the defendant never had any authority to sell his beer, except with a license. He never had any positive assurance that a license would be granted to him, or if granted, that it would be extended or renewed; and even with a license, he could not sell his beer at any other place than at the city of Salina. And his right to sell beer for any considerable period of time was always based upon many uncertainties and contingencies. Under the present law, the defendant, with a permit, which he can easily obtain, can manufacture all the beer for medical, scientific and mechanical purposes which he chooses to manufacture, and can sell the same for such purposes, provided he can find purchasers therefor. The material restrictions imposed by the present law, in addition to those imposed by the old law, are simply as to the purposes for which he may sell, and as to the persons to whom he may sell for medical purposes. There are no other material or snbstantial restrictions.

Under such circumstances we hardly think that the defendant had such a vested interest in the old law, or in anything else, as would prevent the passage of a law like our present prohibition act. It would hardly seem that the defendant, by erecting a brewery in 1877, and by operating it for some time afterward, could obtain such a vested interest in anything as to prevent further legislation with respect to intoxicating liquors, or a more restrictive and stringent character; or that he could go on, with or without legislation, and with or without a license, manufacturing and selling beer forever. We suppose that the defendant founds his right to continue to manufacture and sell beer solely and exclusively upon his supposed vested right to operate his brewery in undisturbed tranquility forever. He certainly will not claim that, independent of his brewery, he had a vested right at the time the constitutional amendment was adopted, or at the time the present prohibition law was enacted, to either manufacture or sell any kind of intoxicating liquor which had not yet been brought into existence. His whole claim, we suppose, springs from the rights which his brewery is supposed to have conferred upon him. But these rights, we think, cannot have such far-reaching consequences as the defendant claims. The beer which the defendant is prosecuted for manufacturing was not in existence at the time when the constitutional amendment was adopted, or at the time when the prohibition act went into operation, but it was manufactured since; and hence, independent of the defendant's interest in his brewery, he could not have had any possible vested right at the time of the adoption and passage of the present prohibition laws, in the manufacture of such beer. Nearly the same may be said with respect to the beer which the defendant is prosecuted for selling. Presumably it was not in existence at the time when the constitutional amendment was adopted; besides, the sale of such kinds of liquor, when made as this sale was made, would have been a violation of the laws of Kansas, and a criminal offense, at any time for the last twenty-three years. In this respect the present law is not new. The sale in the present case was made without a permit or a license. It may be that the defendant

has suffered great loss on account of the passage of the prohibition act, but such loss is not the direct and immediate result of such act; it is simply the remote and consequential result of the act, and is wholly speculative and problematical. Such indirect and remote losses cannot render acts of the legislature unconstitutional. (*The Beer Co. v. Massachusetts*, 97 U. S. 25; *Bartemeyer v. Iowa*, 85 U. S. [18 Wall.] 129.)

It is frequently the case that the passage of statutes indirectly affects the values of property as this act does, and still we do not think that such statutes are ever declared to be unconstitutional merely for such reasons. We think that the present prohibition act of Kansas is constitutional, so far as it affects the defendant, and so far as it has any application to the two cases now under consideration. We do not think that the court below committed any error in either of these two cases; but even if it did with respect to the motions of the defendant, which it overruled, the errors were wholly immaterial. In the first case, the defendant was tried upon an agreed statement of facts, simply for manufacturing intoxicating liquors contrary to law. In the second case, he was tried upon an agreed statement of facts, upon the first count only of the indictment, and merely for selling intoxicating liquor contrary to law, and for one sale only; and in both cases we think the judgment of the court below was correct.

HORTON, C. J., concurring.

BREWER, J.: I concur fully in the foregoing opinion, so far as it relates to the charge of selling beer; and I think the reasoning of my brother VALENTINE thereon is unanswerable. But as to the case in which the charge is of manufacturing beer, and without regard to the purpose for which it was manufactured, while I do not care to formally dissent, I must say that my judgment is not satisfied. The defendant may have manufactured the beer for his own consumption. It certainly is not shown or alleged that he did not, and in a criminal proceeding it is not to be presumed that defendant has done wrong. And I have yet to be convinced that the legislature has the power to prescribe what a citizen shall eat or drink, or what medicines he shall take, or prevent him from growing or manufacturing that which his judgment approves for his own use as food, drink, or medicine.

Further, prior to the constitutional amendment, the manufacture of beer was free and unrestricted. No license, permit or condition was required. Under that state of the law this defendant invested his means in building and machinery suitable for the purpose of manufacturing beer, and unsuitable for any other purpose, worth $10,000 for the former use, and not to exceed $2,500 otherwise. The denial of the use has thus practically deprived him of $7,500. Is not this taking private property for public use, without any compensation? If the public good requires the destruction of the value of this property, is not prior compensation indispensable?

1382

IN THE

Supreme Court of the United States.

THE STATE OF KANSAS, ON THE RELATION OF J. F. TUFTS, ASSISTANT ATTORNEY GENERAL, PLAINTIFFS,

vs.

Herman ZIEBOLD & Joseph HAGELIN, DEFENDANTS.

MOTION.

Comes now the plaintiff by its solicitor, S. B. Bradford, and prays the Court for an order setting over and advancing this cause for trial and submission at this term of the Court for the several reasons assigned and herewith submitted, and that this cause be now heard on the presentation of the record and briefs filed.

S. B. BRADFORD,
Solicitor for Plaintiffs.

In *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, an exclusive contract similar to that granted the Crescent City Co. in 111 U. S., was before the court, but that being simply a contract covering the manufacture of gas and its distribution for public and private use by means of pipes laid under legislative authority in the streets and ways of the city, the court held that "so far from affecting the public injuriously, it has become one of the most important agencies of "civilization for the promotion of the public convenience and "public safety."

"With reference to the contract in this case, it may be said "that it is not in any legal sense to the prejudice of the "public health or the public safety." "The constitutional pro- "hibition upon State laws impairing the obligation of con- "tracts, does not restrict the power of the State to protect the "public health, the public morals, or the public safety, as the "one or the other may be involved in the execution of such "contracts. Rights and privileges arising from contracts "with a State, are subject to regulations for the protection of "the public health, of the public morals, and the public "safety, in the same sense and to the same extent as are all "contracts, and all property, whether owned by natural per- "sons or corporations. Whatever, therefore, in the manu- "facture or distribution of gas in the city of New Orleans "proves to be injurious to the public health, the public com- "fort, or the public safety may, notwithstanding the exclusive "grant to plaintiff, be prohibited by legislation or by municipal "ordinance passed under legislative authority. It cannot be "said with propriety, that to sustain that grant is to obstruct "the State in the exercise of her power to provide for the "public protection of health and safety."

8. It is not every kind of vested property rights that falls

within the provision of the constitution, that no State shall pass any law impairing the obligation of contracts. Vested property rights which do not rest on contracts, may be divested by State legislation without infringing on the protection of that clause. (*Satterlee v. Matthewson*, 2 Pet. 380; *Watson v. Mercer*, 8 Pet. 88, and cases cited; *Louisiana v. Mayor of New Orleans*, 109 U. S. 285.)

In the last case cited, it was held that to deny to a municipal corporation the right to impose taxes to such an extent as to make it impossible to pay a judgment recovered against it for injuries done by a mob, is not depriving the owner of the judgment of property within the meaning of the fourteenth amendment, although the power to levy taxes for that purpose existed when the judgment was recovered, and by the change the owner of the judgment was rendered powerless to enforce his judgment, the reason being that the right being in no sense founded on contract, and merely statutory, it may be given or taken away at pleasure.

9. When the bond and petition for a removal to the Circuit Court was presented to the District Court of the State for approval, the judge of that court delivered an elaborate opinion reviewing all the authorities, and decided that the cause was not removable. No better presentation of the case can be made than is contained in the able opinion of Judge MARTIN, above referred to; and for the convenience of the court, we produce the same here as a part of our argument:

THE STATE OF KANSAS, *ex rel.* J. F. TUFTS, Assistant Attorney General, *Plaintiff*, vs. ZIEBOLD & HAGELIN, *Defendants*.

On application to remove to United States Circuit Court.

MARTIN, J.: This is an action under the clause of section 13 of the prohibitory liquor law, which was added by the Legislature of 1885, the relator averring that the defendants have no permit from the probate judge of this county either to manufacture or sell intoxicating liquors, and that they are doing both at their brewery, near the city of Atchi-

son; asks that they be enjoined from selling and from manufacturing for sale, in the State of Kansas, any malt, vinous, spirituous, fermented, or other intoxicating liquors.

The defendants have filed an answer, containing a general denial, and also an averment to the effect that the defendants' brewery, which is alleged to be of the value of $60,000, was erected prior to the adoption of the prohibitory amendment to the constitution of this State, and the passage of the prohibitory law, for the purpose of manufacturing beer, and that it is adapted to no other purpose, and that if the defendants are prevented from the operation thereof for the purpose for which it was erected, the same will be wholly lost to the defendants, and that said prohibitory act is unconstitutional and void.

The defendants have also presented a petition and bond for the removal of the case to the Circuit Court of the United States for the district of Kansas for trial. In the petition for removal is is alleged that said prohibitory act is in contravention of article 4, and section 1 of article 14, of the amendments to the Constitution of the United States.

The record presents for adjudication certain Federal questions which will require the removal of the cause, unless the propositions involved have been settled by decisions of the Supreme Court of the United States. But as stated by the present learned Judge for the Eighth Circuit, "when a proposition has once been decided by the Supreme Court, it can no longer be said that in it there still remains a Federal question." (*State, ex rel., vs. Bradley*, 2 Kas. Law Jour. 376.) It is a part of the constitutional history of this country, that the ten amendments to the Federal Constitution, numbered 1 to 10 inclusive, which were submitted to the States for ratification by the first Congress at its first session, were intended as limitations upon the powers of the Federal Government, and not as restrictions upon the authority of the States; and as a result no State statute can be held null and void by any court, State or Federal, on account of a supposed conflict with these amendments, or any of them. Article 4, which is quoted in the petition for removal, and which relates to unreasonable searches and seizures, may therefore be dismissed from our consideration.

Barron v. The Mayor and City Council of Baltimore, 7 Pet. 243.
Livingston's Lessee v. Moore, 7 Pet. 469, 551, 552.
Fox v. State of Ohio, 5 How. 410, 434, 435.
Smith v. State of Maryland, 18 How. 71, 76.
Twitchell v. The Commonwealth, 7 Wall. 321, 325, 326.
United States v. Cruikshank, 92 U. S. 542, 552.

The real point suggested by the petition for removal is, whether in view of the decisions of the Supreme Court of the United States, it is yet an open question that the prohibitory liquor law of this State, in so far as it restricts the right to sell and manufacture beer, is or is not in contravention of section 1 of article 14 of said amendment, which reads as follows:

"SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they re-

side. No State shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

Our own Supreme Court, in a case nearly like this one, has held that the act is not in conflict with this section, Justice BREWER (now of the Federal Circuit bench) dissenting. (*State vs. Mugler*, 29 Kas. 252.)

The United States Circuit Court for the Northern District of Georgia also takes the same view as our Supreme Court in the case of a brewery similarly affected by the recent local-option law of Georgia. (*Well vs. Calhoun*, 25 Fed. Rep. 865.)

In the case of *State, ex rel., vs. Walruff*, 2 Kas. Law Jour. 405, 22 Cent. Law Jour. 171, Judge BREWER adheres, however, to his dissenting opinion in the Mugler case, and holds the statute in question to be in conflict with the fourteenth amendment, because no provision is made in the act for the payment of damages to property and business injuriously affected by its operation; and this decision has been followed by Judge LOVE, of the Federal District Court for Iowa, in two cases. (22 Fed. Rep. 883, 892.)

The decisions of the State courts of last resort and of the inferior Federal courts are not conclusive upon the interpretation of the Federal Constitution. The Supreme Court of the United States is, however, the final expositor and arbiter of all disputed questions touching the scope and meaning of that sacred instrument, and its decisions thereon are binding upon all the courts, both State and Federal.

Is the doctrine of the Walruff case supported by these decisions? With the utmost deference to the opinion of Judge BREWER, we are constrained to think not. The authorities cited by him certainly do not justify his proposition, and other cases not referred to are inconsistent with his views. He treats the Walruff brewery as if taken by the State for public use without just compensation. Yet, this alone, if true, would not be a matter of Federal cognizance. By the fifth amendment the Federal Government was inhibited from depriving any person of life, liberty or property without due process of law, and also from taking private property for public use without just compensation. But as remarked by Justice MILLER in *Davidson vs. New Orleans*, 96 U. S. 97, 105, in commenting on the clause of the fourteenth amendment forbidding the State from depriving any person of his property without due process of law, "If private property is taken for public uses without just compensation, it must be remembered that when the fourteenth amendment was adopted the provision on that subject in immediate juxtaposition in the fifth amendment with the one we are construing was left out, and this was taken."

Prior to the adoption of the fourteenth amendment, a man whose property was taken by any State process for public use without just compensation could not on that ground resort to the Federal courts for redress. His remedy was in the State courts, and it remains so to this day, that amendment being entirely silent upon the subject. But the

doctrine in the Walruff case seems to assume that the deprivation of property without due process of law is the same thing as the taking of private property for public use without just compensation, or that the former includes the latter. But the statesmen who framed the early amendments were at least as wise and had as accurate an understanding of the import of words in a fundamental law, as any who have succeeded them. They were not given to a waste of words, nor the useless and perplexing repetition of the same propositions in different forms. They recognized the fact that private property might be taken for public use under regular process without just compensation, and also that a man might be deprived of his property without due process of law, and yet obtain compensation therefor to the full measure of its value; and the Federal Government was inhibited from both of these forms of injustice, while the States were left free to establish such rules on the subject as they deemed proper.

Since the adoption of the fourteenth amendment, however, the fact that a person is deprived of his property by a State, without due process of law, constitutes a ground for the exercise of jurisdiction by the Federal courts. Referring to this subject in the case of *Davidson v. New Orleans*, supra, Justice MILLER says:

"It is not a little remarkable that, while this provision has been in the Constitution of the United States as a restraint upon the authority of the Federal Government, for nearly a century, and while during all that time the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theater of public discussion. But while it has been a part of the Constitution as a restraint upon the powers of the States only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty and property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of the provision as found in the fourteenth amendment. In fact, it would seem from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

Neither the State nor the Federal courts ever had any rightful power to avoid an act of a State legislature because by such court deemed impolitic or unreasonable. It could only be so avoided when in contravention of the Constitution of the State, or of the Federal Constitution, or some act of Congress passed or treaty made in pursuance of its authority. The views of a court upon the merits or demerits of a statute have nothing to do with its validity. In the Walruff case an effort appears to be made to blend and combine two principles; one embraced in the fourteenth amendment, and the other entirely outside of the constitution, and then to show that the Kansas liquor law is in conflict with the combined principle. The syllabus of the case shows this. It reads as follows:

"The prohibitory amendment to the constitution of Kansas, and the laws passed in pursuance thereof, condemn and confiscate to public use all property then in use for

the manufacture of the prohibited articles, and having failed to provide compensation therefor, are in violation of the fourteenth amendment to the Constitution of the United States, as taking property without due process of law."

Waiving, however, for the present, this unwarranted blending of constitutional and extra-constitutional principles, it is safe to assert that no decision of the Supreme Court of the United States either establishes or tends to establish the doctrine that a liquor law such as ours operates upon the owners of distilleries or breweries as a taking of private property for public use, or as a deprivation of property without a due process of law.

The scope of the first section of the fourteenth amendment was first fully discussed by that tribunal in the *Slaughter-House* case, 16 Wall. 36:

"The Legislature of Louisiana, on March 8, 1869, passed an act conferring upon the defendant company, a corporation created by the act, the exclusive right, for twenty-five years, to have and maintain slaughter houses, landings for cattle, and yards for confining cattle intended for slaughter, within the parishes of Orleans, Jefferson, and St. Bernard, a territory comprising an area of 1,154 square miles, including the city of New Orleans, and prohibiting all other persons from keeping or having slaughter houses, landings for cattle, and yards for confining cattle intended for slaughter, within said limits, and requiring that all cattle and other animals to be slaughtered for food in that district should be brought to the slaughter houses and works of said company, to be slaughtered upon the payment of a fee and certain perquisites to the company for such service. The plaintiffs, an association of butchers, averred that prior to the passage of the act in question they were engaged in the business of procuring and bringing to said parishes, animals suitable for human food, and in preparing the same for market; that in the prosecution of this business they had provided in these parishes suitable establishments for landing, sheltering, keeping and slaughtering cattle, and the sale of meat; that with their association about 400 persons were connected, and that in said parishes almost 1,000 persons were thus engaged in procuring, preparing and selling animal food. It is evident that the establishment of the plaintiffs would be rendered almost valueless, and their business substantially broken up, by the operation of the monopoly created by the Legislature. And yet the Supreme Court held that this legislation was not in contravention of any of the provisions of the fourteenth amendment, but that it was a valid exercise of the police power of the State of Louisiana, with which the Federal courts could not rightfully interfere."

In the entire official report of the case, embracing nearly one hundred cases, and including the brief of the unsuccessful counsel, the opinion of the court, and the views of three of the dissenting Justices, there is not a word of reference to the taking of private property for public use without first compensation. The learned Justice did not seem to regard this as one of the evils that the fourteenth amendment was designed to remedy. To the argument that the butchers were deprived of their property without due process of law, Justice MILLER, delivering the opinion of the court, answered as follows:

"It is sufficient to say that under no construction of that provision that we have ever seen, or that we deemed admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans, be held to be a deprivation of property within the meaning of that provision."

In the case of *Bartemeyer v. Iowa*, 18 Wall. 129–133, Justice MILLER again delivering the opinion, the court says:

"The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating and even prohibiting the

traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, *Wynehamer v. The People*, 3 Kernan, 485, has held that as to such property the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a State or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such right exists, is not one of the rights growing out of citizenship of the United States, and in this regard the case falls within the principles laid down by this court in the *Slaughter-House* case."

The "solitary exception" from the principle is then referred to as follows:

"But if it were true, and if it were fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquor, then we can see that two very grave questions would arise, namely: 1. Whether this would be a statute depriving him of his property without due process of law; and secondly, whether it would be so far a violation of the fourteenth amendment in that regard as would call for judicial action by this court."

And Justice FIELD, concurring specially, says:

"I have no doubt of the power of the State to regulate the sale of intoxicating liquors when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such article, as well as to use and enjoy it. Any act which declares that the owner shall neither sell nor dispose of it, nor use and enjoy it, confiscates, depriving him of his property without due process of law."

In the Walruff case Judge BREWER lays great stress upon those passages relating to the doctrine in the New York case. But what relevancy they had to the Walruff case is difficult to imagine. It was not claimed that Walruff had any beer that was manufactured prior to the adoption of the prohibitory amendment and the passage of the prohibitory law of 1881; and if such a fact had been made to appear, still neither said amendment nor the act of 1881 imposed an absolute prohibition upon the sale of such beer and not even the slightest restriction upon its use, except that the owner shall not become drunk by imbibing it. Although the tenth amendment to our State Constitution and the legislation in pursurance thereof are commonly called prohibitory, yet they are not so in strictness of speech, as fully stated by our Supreme Court in the Mugler case. The evident purpose of both is to diminish the evils of intemperance by placing the manufacture and sale of intoxicating liquors under regulations more strict than those formerly existing.

It is said, however, that Walruff owned a brewery—a building and its appurtenances especially adapted to the manufacture of beer—prior to the adoption of said amendment. This is a great remove from the "solitary exception" mentioned by Justice MILLER in the Iowa case—a remove from the product in the manufactory. But the title to such brewery is in no manner affected or incumbered by the amendment and the statutes. Neither the real estate nor the personal property "taken" by the State for public use. The State obtains no

title, no easement, no license, nothing. And the owner is in nowise *deprived* of his property; he parts with nothing. It is true that the State restricts and regulates to some extent the use of such property, so that, in the opinion of the legislature, it shall not be an instrument of hurt and injury to the public. And this brings us to the quotation by Judge BRADLEY from the opinion of Justice FIELD in the Chicago Elevator case, entitled *Munn v. Illinois*, 94 U. S. 113, 141, as follows:

"All that is beneficial in property arises from its use and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received."

It must be remembered, however, that this is not the opinion of the court, but only the view of one of the two dissenting Justices. The court, by Chief Justice WAITE, states as its opinion that by the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and when necessary for the public good, the manner in which each shall use his own property. Accordingly, it was held that notwithstanding the provisions of the fourteenth amendment to the Constitution of the United States, the grain elevators built in Chicago by private enterprise, with private capital and owned by individuals prior to the adoption of the Constitution of 1870 by the people of Illinois, were so far subject to the power of the State under that constitution, that a subsequent legislature might make rules and regulations for the government of elevators in their dealings with their patrons, and might fix the value of the use of such elevator property by establishing maximum rates for the storage, handling and transfer of grain.

The case of *Beer Company v. Massachusetts*, 97 U. S. 25, reaffirms *Bartemeyer v. Iowa*, and upholds to the fullest extent the authority of the States over the manufacture and sale of intoxicating liquors, subject to the one exception specified in the Iowa case, which has been already fully discussed. In this case, however, the Beer Company relied upon certain chartered privileges in the nature of a contract rather than upon the fourteenth amendment, but the court held that the Legislature could not by any contract divest itself of its police power, which was held to extend to the protection of the lives, health and property of her citizens, the maintenance of good order and the preservation of the public good.

See further as to the police powers of the State, *Patterson v. Kentucky*, 97 U. S. 501, and authorities cited.

In *Stone v. Mississippi*, 101 U. S. 814, it appeared that in 1867 the Legislature of Mississippi granted a charter to a lottery company for twenty-five years in consideration of a stipulated sum of cash, an annual payment of a further sum, and a percentage of receipts for the sale of tickets. A provision of the Constitution adopted in convention May 15, 1868, and ratified by the people December 1, 1869, declares that

"the Legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." And he also held that the prohibition of such lotteries was not an infringement of vested rights within the meaning of the Constitution of the United States, and that the legislature could not, by chartering a lottery company, defeat the will of the people of a State authoritatively expressed in relation to the continuance of such business in their midst. The lottery company did not invoke any immunity by reason of the fourteenth amendment, although it was officially promulgated long before the ratification of the State Constitution by the people of Mississippi. It relied, as did the Beer Company in the preceding case, upon the clause of the Constitution of the United States declaring that no State shall pass any law impairing the obligation of contracts. And neither the aggrieved parties nor the court seem to have discovered that the proceedings constituted a taking of private property for public use without just compensation, nor a privation of property without due process of law.

In *Foster v. Kansas*, 112 U. S. 201, (32 Kan. 765,) the Supreme Court of the United States, in an opinion covering only a few lines, holds our Kansas liquor law of 1881 to be valid, and not repugnant to the Constitution of the United States, on the authority of the Iowa and Massachusetts cases before referred to. And the amendment of 1885 to the act of 1881 did not render the liquor law any more objectionable on any ground raised in this case or the Walruff case.

Some quotations have already been made from the opinion of the court in *Davidson v. New Orleans*, 96 U. S. 97, where an assessment of certain real estate in New Orleans, for draining the swamps of that city, was resisted in the State courts on the ground that the proceeding deprived the owner of his property without due process of law, in violation of the fourteenth amendment. But it was held that neither the corporate agency by which the work was done, the excessive price which the statute allowed therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment was made before the work was done, nor that it was unequal as regards the benefits conferred, nor that personal judgments were rendered for the amounts assessed, were matters in which the State authorities were controlled by the Federal Constitution, and the assessment was therefore held valid as against any objection which could be raised in the Supreme Court of the United States on a proceeding in error from the Supreme Court of Louisiana.

In *Barbier v. Connolly*, 113 U. S. 27, the court held that the fourteenth amendment of the Constitution does not impair the police power of a State, and that an ordinance of the city of San Francisco, prohibiting from washing and ironing in public laundries and wash-houses, within defined territorial limits, from ten o'clock at night to six in the morning, was purely a police regulation within the competency of a

municipality possessed of the ordinary powers. And in another case, under the same ordinance—*Soon Hwig v. Crowley*, 113 U. S. 703—it was held to be no valid ground of constitutional objection that the ordinance permitted other and different kinds of business to be done within the hours prohibited to laundries and wash-houses. This ordinance was intended to and did bear heavily upon the Chinese, who owned and kept laundries and wash-houses in that city, and such establishments must have been greatly depreciated in value by the enforcement of this restrictive regulation; yet the Supreme Court decided that the fourteenth amendment did not invest the Federal courts with any power to grant relief—Justice FIELD delivering the unanimous opinion of the court in both cases.

In the case of *The Missouri Pacific Railway Co. v. Humes*, 115 U. S. 514; it was held that a statute of Missouri requiring every railway corporation in the State to erect and maintain fences and cattle-guards on the side of its road, and if it does not, making it liable to double the amount of damages occasioned thereby and done by its agents, cars or engines to cattle or other animals on its road, does not deprive a railroad corporation, against which such double damages are recovered, of its property without due process of law, or deny it the equal protection of the law in violation of the fourteenth amendment. Justice FIELD, in delivering the opinion of the court, refers with approval to the remarks of Justice MILLER, in *Davidson v. New Orleans*, respecting the general misconception of the scope of these provisions, and says:

"If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law."

And again:

"It is hardly necessary to say that the hardship, impolicy or injustice of State laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from State legislatures. Our jurisdiction cannot be invoked unless some right claimed under the Constitution, laws or treaty of the United States is invaded. The court is not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation."

This review of the leading decisions of the Supreme Court of the United States, giving a construction to section 1 of the fourteenth amendment, taken with the admitted doctrine of that court prior to said amendment, that the manufacture and sale of intoxicating liquors within a State were purely and exclusively matters of State regulation and control, is sufficient to establish the following propositions, namely:

1. The first clause of that section relates to the privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of citizens of the State, and the right to manufacture and sell intoxicating liquors is not one of those privileges and immunities which by that clause the States are forbidden to abridge.

2. The States have as complete power now as ever to so regulate the

use of property within their limits that it shall not be made an instrument of injury to the public, but rather to promote the general welfare.

3. The regulation of the manufacture and sale of intoxicating liquors within a State, being matters of public and internal government, are not impaired by said section 1 of the fourteenth amendment; but the powers of the State to deal with the subject are as full, complete and exclusive since as before the adoption of said amendment, provided that the owner of property be not deprived of it without due process of law.

4. The present law of this State prohibiting the defendants from manufacturing and selling beer without a permit, and restricting the purposes for which it may be manufactured and sold, is not a taking of the defendant's brewery by the State for public use, nor a deprivation of the defendants of their brewery, within any admissible construction of those respective clauses of said section.

5. And these propositions having been settled by repeated decisions of the Supreme Court of the United States, there is no longer a Federal question which should be certified by a State court to an inferior Federal court for decision.

The cases cited in the opinion in the Walruff case other than those already referred to appear to be entirely irrelevant, unless it be in the case in 18 How. 272, which discusses the meaning of the phrase "due process of law," but it is not inconsistent with any position taken in this opinion.

Pumpelley v. Green Bay Company, 13 Wall. 166, is cited as a "leading case." The action was commenced before the adoption of the fourteenth amendment, and it involved the construction of that provision of the Constitution of the State of Wisconsin which declares that "the property of no person shall be taken for public use without just compensation therefor." The plaintiff's land to the extent of 640 acres was overflowed by reason of a dam erected by the defendant company, and had been substantially submerged before the action was commenced, and it was held that this was such a taking of the plaintiff's land as required compensation to be made—a principle which would certainly be law in Kansas, the very principle of our mill-dam act. But here the defendant corporation obtained a valuable easement upon the land of the plaintiff, who was almost wholly deprived of its actual possession and use. The Illinois, New Jersey and New York cases referred to in the opinion also treat of the right of eminent domain and the qualifications of that right, but they are no nearer in point than the case in 13 Wallace.

The doctrine of the Walruff case is, that by force of the fourteenth amendment, a State cannot alter its laws and institute what it deems necessary reforms without first making compensation to those who would suffer a consequential loss by the change.

At the beginning of the civil war, the business of the distiller was as

free from interference and taxation by the General Government as any other industry or manufacture. In order to raise revenue for the prosecution of the war, however, distilled spirits were taxed to several times their first cost, and all distilleries were placed under the strictest Government surveillance; and although during late years the tax has been in part abated, yet the absolute Government control still continues. Under the operation of the internal revenue laws, hundreds of the owners of the smaller distilleries were compelled to close them, or flee with them to the mountains and become "moonshiners," and their investments in them became almost a total loss. But, although by the fifth amendment the Federal Government has always been forbidden from taking private property for public use without just compensation, and also from depriving any person of life, liberty or property without due process of law, yet we have never heard of the presentation of a claim by a ruined distiller against the Government, for the reparation of his loss, and such a claim would certainly not be seriously entertained. But why is not such a claim against the United States as good as a like claim by the defendants upon this State? May not the State safely go as far in the exercise of her police power for the protection of the property, health and morals of her inhabitants, as the United States may proceed, under her power of taxation, to raise revenue to defray her extraordinary expenses? We will suppose the case of a new State, where, either because no apparent necessity existed, or from inadvertence or neglect, no statute was enacted against the keeping of gambling houses, and while this state of affairs existed many such places were established, at a large outlay of money, and the proprietors were carrying on a lucrative business: must the State, as a condition precedent to the enforcement of legislation against the evil, purchase and pay for the houses, or their furniture and gambling devices, together with the good-will of their business? And the same inquiry might be made as to houses of ill-fame, and lotteries, under similar circumstances. Think of the State being compelled to buy up gambling houses, brothels and lotteries, and the good-will of such establishments, before any statute for their suppression can be enforced! Judge Love, following the authority and logic of the Walruff case, holds that the protection of the fourteenth amendment extends to dramshops or saloons which were in existence prior to the enactment of the Iowa prohibitory liquor law, and that the State must buy them out in order to their suppression. And the principle carried to its legitimate conclusion will also embrace all the supposed cases hereinbefore named, and cover them with like immunity.

Such a construction of the beneficent and liberal provisions of the first section of the fourteenth amendment is utterly untenable and inadmissible. The fourteenth is one of the three amendments growing out of the civil war, having in the main a unity of purpose in three successive steps: First, the emancipation of an enslaved race; secondly, the clothing of that race with National and State citizenship and full

civil rights; and thirdly, their political enfranchisement as a guaranty against the invasion of their newly-acquired rights.

And as Justice MILLER says in the *Slaughter-House* cases, in giving a construction to any of these amendments it is necessary to keep this main purpose steadily in view, though their letter and spirit must apply to all cases coming within their purview, whether the party concerned be of African descent or not.

Neither the advocates nor the opponents of the fourteenth amendment while it was the subject of discussion in Congress, before the State legislatures, and by the people, ever placed any such construction upon section 1 as that set forth in the Walruff case. If its advocates had avowed a construction so degrading to the States, and so subversive of their authority, it is doubtful if it would have been ratified by a single member of the Union. Happily, the Supreme Court of the United States has repeatedly spoken in such terms as to give assurance against any fear that such an interpretation of that section shall ever become the law of the land.

The application to remove the case to the United States Circuit Court for trial will be denied.

The opinion of Judge BREWER, of the United States Circuit Court, in the "Walruff case," is repeatedly referred to by Judge MARTIN; and in order that the court may judge of the force of the reasoning of that able judge by which he arrived at a different conclusion than that here contended for as the correct one, we include that opinion also:

THE STATE OF KANSAS, *ex rel.*, vs. JOHN WALRUFF, *et al.*

The prohibitory amendment to the Constitution of Kansas and the laws passed in pursuance thereof condemn and confiscate to public use all property then in use for the manufacture of the prohibited articles, and having failed to provide compensation therefor, are in violation of the fourteenth amendment to the Constitution of the United States, as taking property without due process of law.

BREWER, J.: The facts upon which the foundation question in this case rests are few and simple. Between 1870 and 1874 the defendants constructed a brewery in Lawrence, Kansas. The building, machinery and fixtures were designed and adapted for the making of beer, and nothing else. For such purpose they were worth $50,000; for any other purpose not to exceed $5,000. At the time of the erection of the building, and up to 1880, the making of beer was as legal, as free from tax, license or other restriction, as the milling of flour. In that year a constitutional amendment was adopted, prohibiting the manufacture of beer except for medicinal, scientific and mechanical purposes. In 1881 and 1885 laws were enacted to carry this prohibition into effect. Under these laws a permit was essential for the manufacture for the excepted purposes. To the defendants this permit was refused. An injunction

was thereupon sued out from the District Court, enjoining defendants absolutely from the manufacture of beer. Thus, in strict conformity to the laws of the State, the defendants are prohibited from using their property for the purposes for which alone it is designed, adapted and valuable, and are required, without compensation, to surrender $45,000 of value, which they had acquired under every solemn unlimited guaranty of protection to property which constitutional declaration and the underlying thought of just and stable government could give.

The action in which this injunction was granted they now seek to remove to this court, and insist that, no matter what the State may think or do, the fourteenth amendment to the Federal Constitution does give protection — or at least that they are entitled to the opinion and judgment of the Federal courts upon the question whether that portion of the fourteenth amendment which forbids a State to "deprive any person of life, liberty or property without due process of law," and "to deny to any person within its jurisdiction the equal protection of the law," is not violated by this action of the State as respects them.

It is idle to deny that the question here presented is one of difficulty and grave importance. On the one hand it is insisted, that both the amendment and the laws were duly and in compliance with established forms of procedure adopted and enacted; that the withholding of the permit was the act of a judicial officer in the exercise of a proper and granted discretion; that the injunction was issued out of the regular court of general original jurisdiction, and in an ordinary and familiar form of action; that thus there has been "due process of law," and that the amendment does not prohibit a State from depriving a person of his property, but only prohibits such deprivation "without due process of law." While on the other hand it is apparent that the defendants, having invested large properties in a perfectly legal business, are stripped of the value of such properties, and that not as the indirect and consequential result of legislative changes in the law, but by a direct prohibition upon the only use for which such properties are designated, adapted and valuable. Is a State potent through the forms of law to take from a citizen, by direct action, the value of his property, without compensation?

As the judge of an inferior Federal court, I turn naturally to the opinions of my superior, the Supreme Court of the United States, for information and guidance. In the case of *Bartemeyer v. Iowa*, 18 Wall. 129, the opinion of the court was delivered by Justice MILLER, and in it the court uses this language:

"But if it were true and it were fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we can see that two very grave questions would arise, namely: Whether this would be a statute depriving him of his property without due process of law; and secondly, whether, if it were so, it would be so far a violation of the fourteenth amendment in that regard as would call for judicial action by this court."

In the same case, in a concurring opinion, Justice BRADLEY said:

"The law, therefore, was not an invasion of property existing at the date of its passage, and the question of depriving a person of property without due process of law, does not arise. No one has ever doubted that a Legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with vested rights of property. When such rights stand in the way of the public good, they can be removed by awarding compensation to the owner."

And Justice FIELD adds these words:

"I have no doubt of the power of the State to regulate the sale of intoxicating liquors, when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such article, as well as to use and enjoy it. Any act which declares that the owner shall neither sell it, nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any State, the fourteenth amendment affords protection."

In the subsequent case of the *Beer Company* v. *Massachusetts*, 97 U. S. 35, the court thus refers to this matter:

"If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance by an incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without compensation, but we infer that the liquor in this case, as in the case of *Bartemeyer* v. *Iowa*, was not in existence when the liquor law of Massachusetts was passed."

In the light of this declaration of the Supreme Court, that when a man owns, with the unrestricted right to use or sell, a glass of liquor, mere personal property, which, without injury or depreciation in value, can be carried outside the jurisdiction of the State, legislation of a State prohibiting its sale, and to that extent only diminishing its value, presents a grave question, under the fourteenth amendment; the further positive assertion of one of the Justices that such legislation is void under that amendment; and a still further intimation of the court, in a later case, that vested rights of property cannot be destroyed for the public good without compensation, it would seem a contemptuous disregard by a subordinate tribunal of the judgment of its superior, for me to hold that legislation of a State, destroying the value by prohibiting the use of property which cannot be moved, and in whose use the owner had prior thereto an absolute and unrestricted title, is clearly not in conflict with that amendment, and presents absolutely no question for the cognizance and judgment of the Federal tribunals.

But I am not content to leave this case upon these authoritative suggestions of the Supreme Court. As a new matter, it is clear to me that there is a Federal question giving right of removal; and here I assert these propositions: First, debarring a man by express prohibition from the use of his property for the sake of the public, is a taking of private property for public uses. It is the power to use, and not the mere title, which gives value to property. Give a man the fee simple to a flouring-mill, coupled with an absolute prohibition on its use, and of what value is it to him? In the most common and ordinary cases of taking private

property for public uses, the condemnation of the right-of-way for a railroad, the title is not divested. The owner still retains the fee simple, and he is only debarred from the use. When the railroad abandons the use he retakes it.

In the leading case of *Pumpelly v. Green Bay Co.*, 13 Wall. 166, which was a case where land was overflowed in consequence of the erection of a dam, the Supreme Court thus disposes of the matter:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the Government, and make it an authority for invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

In the case of *Munn v. Illinois*, 94 U. S. 141, Justice FIELD uses this language:

"All that is beneficial in property arises from its use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received."

I meet here the common argument that when private property is taken for public use, there is always a transfer of the use from one party to another, that here the use is not transferred, but only forbidden, and that this deprivation of the use is only one of the consequential injuries resulting from a change of policy on the part of the State, for which no compensation or redress is allowed. It is *damnum absque injuria*. The argument is not sound. As a matter of fact, in condemnation cases, seldom is the particular use to which the property has been put transferred. Almost always that use is destroyed in order that another may be acquired. The farmer surrenders a part of his farm to the railroad company, not that the company may continue its use for farming purposes, but that the public may acquire the benefit in another direction; so where land is flowed by a mill-dam. And thus it is generally. Here the use is taken away solely and directly for the benefit of the public. For no other reason and upon no other ground could it be disturbed. Of course in this, as in other cases, some use remains to the owner, but here, as elsewhere, the use which is of special value is taken from him for the benefit of the public. And this is not a consequential result. It is not that the profits of his manufacture are reduced by reason of a prohibition upon sales. The law speaks to him by direct command, and says, "Stop your manufacturing." It is

idle to talk of consequential results and injuries, when the law in direct language forbids the use of the premises for a brewery.

I assert, secondly, that natural equity as well as constitutional guaranty forbids such a taking of private property for the public good without compensation. In the case of *The State v. Mugler*, 29 Kas. 252, this question was presented to the Supreme Court of Kansas, and as a member of that court I then expressed this opinion. I am aware that my brethren differed with me, and that the court held that the State Constitution carried no such proposition. In view of that decision, I shall have little to say in respect to the guaranties in the State Constitution. I may, however, be permitted to say, and I do it with the highest respect for the members of that court, and with the utmost deference to its opinion and judgments, that in the light of the frequent discussions of the question since that decision, and the more I have reflected thereon, the more profoundly am I convinced that the guaranties of safety and protection to private property contained within our State Constitution forbid that any man should thus be despoiled of that which gives value to his property for the sake of the public good, without first receiving compensation for that which is taken from him.

Turning to the opinions of other courts, I find strong indorsement of the proposition I have asserted. In the case of *Lake View v. Rose Hill Cemetery Company*, 70 Ill. 101, the court says:

"We are unwilling to concede the existence of an indefinable power, superior to the constitution, that may be invoked whenever the legislature may deem that public exigency may require it, by which a party may be capriciously deprived of his property, or its use, whether such property consists of franchises or tangible forms of property."

The Constitution of New Jersey contains no such guaranty as ours, yet the Supreme Court of that State, in *Sinnickson v. Johnson*, 2 Harrison, 129, declares:

"That this power to take private property reaches back of all constitutional provision, and it seems to have been a settled principle of universal law, that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle."

The Constitution of New York was similarly deficient, and yet in *Gardner v. Newburg*, 2 Johns. Ch. 162, Chancellor KENT granted an injunction to prevent the trustees of Newburg from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the legislature which authorized it had made no provision for compensating the plaintiff for the injury thus done to his land. After citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses, when public necessity or utility requires, they all lay it down as a clear principle of natural equity, that the individual whose property is thus sacrificed must be idemnified. And he adds that the principles and practice of the English Government are equally

explicit on this point. Were similar action taken by the State in respect to other industries, I can but think the vigor of constitutional guaranties would seem clearer. In my own city is a large manufacturing establishment, in which hundreds of thousands of dollars have been invested for the making of glucose. This is an inferior kind of sugar, and in the opinion of some a deleterious article. Yet the industry is legal — the manufacture not forbidden. Suppose the next legislature should believe that glucose was injurious to the public health, and forbid its manufacture. Could the wheels of that manufactory be stayed, and the value of that investment be destroyed, without compensation? Take also the illustration of playing-cards, which by reason of their use for gambling purposes are, in the judgment of many good people, a bane to society. If a factory for their manufacture was established when, as now, a perfectly legal industry, would the owner hold his investment subject to the opinions of perhaps a temporary majority?

Or take a still stronger illustration: This is a corn-growing State, yet wheat also is raised abundantly, and many flour-mills exist. Suppose the legislature should determine that the best interests of the State would be promoted by stopping the growing of wheat and increasing the crop of corn, and to that end should prohibit the milling of flour. Must the owners, without compensation, abandon their milling and sacrifice their investment? Does not natural justice, as well as constitutional guaranty, compel compensation as a condition to such sacrifice? Yet who can state what the law will recognize as a legal distinction between those cases and this? Of course it will be said that no legislature would ever think of such extreme and unreasonable action. But the question for courts to determine is not what is likely to be done, but what can be done.

Thirdly, I affirm that no matter what legislative enactments may be had, what forms of procedure, judicial or otherwise, may be prescribed, there is not "due process of law" if the plain purpose and inevitable result is the spoliation of private property for the benefit of the public without compensation. It is a mistake to say that the forms of law alone constitute "due process." No complete and perfect definition of the phrase "due process of law" has yet been given. The most familiar, and one for ordinary cases sufficiently accurate, is that given by DANIEL WEBSTER in the celebrated *Dartmouth College* case, the "law of the land" being substantially equivalent to "due process of law," as follows: "By the law of the land is meant the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only upon trial."

But, as said by Mr. Justice MILLER, in *Davidson v. New Orleans*, 96 U. S. 104, it is probably better "to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

In the same case, Mr. Justice BRADLEY adds these words:

"In judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'"

In *Murray's Lessee v. Hoboken L. & I. Co.*, 18 How. 226, the Supreme Court thus limits the meaning of the phrase:

"The Constitution contains no description of these processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will."

Now, in the case at bar, while judicial proceedings are prescribed, yet the spoliation is the direct command of the legislature, and the judicial proceedings are only the machinery to execute the command. No discretion is left to the courts. The legislature has in terms said to defendants, "Stop your use of your brewery," and has directed the courts to enforce that command. There is nothing but mere machinery between the legislative edict and an unused, valueless manufactory. As well might the executive as the courts be charged with the enforcement of this command. Such a command, no matter how enforced, operating to deprive the citizen of the value of his property without compensation, is, in the language of Mr. Justice BRADLEY, *supra*, "arbitrary, oppressive and unjust," and therefore should be "declared to be not due process of law."

Fourthly, and as a necessary consequence of the preceding, legislation which operates upon the defendants as does this, is in conflict with the fourteenth amendment, and as to them void. At least it presents a question arising under such amendment as to which they are entitled to the opinion and judgment of the Federal courts; as the amount in controversy is unquestionably in excess of five hundred dollars, the case is a removable one. In view of what has hitherto fallen from my pen in other cases, it may be unnecessary to add anything further; yet to guard against any possible misapprehension, as well as to indicate that my views, as expressed upon other questions, have not changed, let me say that I do not in the least question the power of the State to absolutely prohibit the manufacture of beer, or doubt that such prohibition is potential as against anyone proposing in the future to engage in such manufacture. Anyone thus engaging does so at his peril, and cannot evoke the protection of the fourteenth amendment, or demand the consideration and judgment of the Federal courts. All that I hold is, that property within the meaning of that amendment includes both the title and the right to use; that when the right to use in a given way is vested in a citizen, it cannot be taken from him for the public good

without compensation. Beyond any doubt the State can prohibit defendants from continuing their business of brewing, but, before it can do so, it must pay the value of the property destroyed.

Nothing that I have said in this opinion is to be taken as bearing on the question of the sale of beer, or the power of the State over that. Counsel claimed that the right to manufacture without the right to sell was a barren right. Whatever limitations may exist in this State, the markets of the world are open, and with such markets the right to manufacture is far from a barren right.

Other questions were discussed by counsel at great length, and with great ability. I have not noticed them in this opinion, already quite lengthy, because this question is in the case, cannot be ignored, and justifies a removal.

The motion to remand will be overruled.

One thing more I may be excused for referring to. In the course of the various arguments that have been made to me in this State and the sister State of Iowa, on the question of removals to the Federal courts of proceedings to enforce their prohibitory laws, it has more than once been intimated that jurisdiction in the Federal courts of such proceedings meant the nullification of those laws. There could be no greater mistake. The judges of these courts are citizens of these States, as interested as any citizens in the good name of their States, the enforcement of their laws, and the sobriety of their citizens. Experience has shown that those courts enforce laws as strictly as any, are as little disposed to tolerate trifling or evasion of their orders, and generally with a severer hand. If it should so happen that by the judgment of the Supreme Court of the United States, the ultimate tribunal in this Nation, it should be determined that in this or any kindred case the zeal for temperance of the good people of this State has led them to infringe upon sacred and protected rights of property, I cannot doubt that they will gladly hasten to make the compensation which shall be found just. Indeed, it is a truth ever to be borne in mind, and never more so than in times of deep feeling and determined effort, that they who are striving to lift society up to the plane of a higher and purer life, should see to it that every act and every step is attended by absolute justice. I commend this to the thoughtful consideration and judgment of the good people of my State—a State in whose past I glory, and in whose future I believe.

The position taken by Judge BREWER in the Walruff case he retained in passing on this case. But with the highest respect and regard for the distinguished jurist who now occupies the Circuit bench of the Eighth Circuit, we respectfully con-

tend that the opinion of Judge MARTIN is founded on the better law and the sounder reasoning.

We ask a reversal of this cause as to the final decree and also as to the ruling on the plea in abatement to the jurisdiction of the Federal courts.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 838.

HERMAN ZIEBOLD AND JOSEPH HAGELIN,

Appellees.

vs.

THE STATE OF KANSAS, EX REL.
J. F. TUFTS, ASSISTANT ATTORNEY-GENERAL,

Appellant.

BRIEF FOR APPELLEES.

ROBERT M. EATON,
JOHN C. TOMLINSON,
JOSEPH H. CHOATE,
Of Counsel for Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 934.

HERMAN ZIEBOLD AND JOSEPH HAGELIN,
Appellees,

ads.

THE STATE OF KANSAS EX REL. J. F. TUFTS, ASSISTANT ATTORNEY GENERAL,
Appellant.

BRIEF FOR APPELLEES.

STATEMENT.

The case presented by the record arises under the thirteenth section of the Prohibitory Liquor Law of Kansas, as amended in 1885, which is as follows:

> "Section 13. *All places* where intoxicating liquors are *manufactured*, sold, bartered, or given away in violation of any of the provisions of this act, or where intoxicating liquors are kept for sale, barter or delivery in violation of this act *are hereby declared to be common nuisances*, and upon the judgment of any Court having jurisdiction *finding such*

place to be a nuisance under this section, the sheriff, his deputy, or under sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses and other property used in keeping and maintaining said nuisance, and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days, nor more than ninety days. The Attorney-General, county attorney or any citizen of the county where *such nuisance* exists, or is kept, or is maintained may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction *shall be granted* at the commencement of the action, and no bond shall be required. Any person violating the terms of any injunction granted in such proceeding, shall be punished as for a contempt, by a fine of not less than one hundred, nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days, nor more than six months, or by both such fine and imprisonment, in the discretion of the Court."

By other provisions of the act the manufacture and sale of beer except for medical, scientific and mechanical purposes is made a misdemeanor. The sale for the excepted purposes can only be made by a druggist, who has received a permit from a County Judge upon proof of good moral character, and that he is engaged in business as a druggist, and has given a bond in twenty-five hundred dollars, and then only upon a sworn physician's prescription. A person can *manufacture* beer for the excepted purposes only upon a similar permit from a County Judge obtained on a similar affidavit and bond, and then may sell, for medical purposes, only to licensed druggists, and, for scientific and mechanical purposes, only in quantities not less than five gallons.

Sections 7 and 8 of the act, respectively, provide for the punishment, upon conviction, of any person that shall sell without a permit, or manufacture without a permit.

No indictment was found against the appellees, but the Attorney-General in the name of the State filed a bill or information under the 13th section in the State Court, alleging their brewery to be a place where malt liquors were sold contrary to law and manufactured for sale in the State of Kansas, and that they had no permit from any probate judge, and praying: First, that the buildings which constituted the brewery be adjudged to be a common nuisance, and for an order directing the sheriff to shut up and abate said place. Second, for an injunction against the defendants as provided by the 13th section.

The appellees having first filed their answer in the State Court, denying all the allegations of the Attorney-General's pleading, and averring that their brewery was erected prior to the passage of the prohibitory law and of the Constitutional amendment of the State of Kansas under which it was passed, and that as against them the act was in violation of the Fourteenth Amendment of the Constitution of the United States, filed their petition and bond for the removal of the cause into the Circuit Court of the United States.

In their petition for removal the appellees set forth that they had erected their brewery before the passage of the Constitutional amendment and the act, and equipped it with costly machinery for the manufacture of beer, and prosecuted their business as brewers therein for years, during which such business was by the law of Kansas perfectly free; that the buildings and machinery could not be used for any other pnrpose; that for the purpose of manufacturing beer they were worth sixty thousand dollars; and that for any other purpose they were of no value; and setting forth as ground for removal that the act was in violation of the Fourteenth Amendment.

To this petition the State filed a plea in abatement denying that any Federal question was involved.

Upon the hearing of the question of removal before the Circuit Judge, affidavits were presented by which it appeared that the appellees purchased the property in 1871 for the sole purpose of a brewery, for which it had been built and equipped, and had since added improvements to the building to the extent of twenty thousand dollars, and

to the machinery to the extent of ten thousand dollars. That at the time of the passage of the Constitutional amendment of Kansas, and the Prohibitory Act, it was worth fifty-five thousand dollars, but for any other purpose not more than six thousand—which the State did not deny.

Thereupon the Circuit Judge overruled the State's plea in abatement to the petition for removal, and ordered the case to be retained in the Circuit Court for further proceedings.

And thereupon the State filed its amended bill in equity, in the Circuit Court, praying for the same relief as was prayed in the State Court, to which the appellees filed their plea; and the cause having been brought to a final hearing and submitted upon bill and answer, the Circuit Court found that the complainant was not entitled to the relief prayed for, and by its final decree dismissed the bill. The State appeals from the order overruling the plea in abatement and from the final decree.

The appellees here insist that the Circuit Court committed no error either in retaining jurisdiction of the cause or in its final decree dismissing the bill; that there was a Federal question involved, viz., whether the Act of the State of Kansas, and particularly the thirteenth section thereof, was not in violation of that portion of the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall "deprive any person of life, liberty or property *without due process of law*"; and that this Federal question was properly answered by the Court below in the affirmative by its decree dismissing the bill.

It is insisted by the State, that the propositions involved in the two assignments of error are substantially the same, and that as well upon the question of removal as upon the main question of relief the State can have some benefit from an allegation contained in its plea in abatement to the petition for removal, not repeated in the allegations of the amended bill nor admitted in the answer, viz., that the appellees are not by this proceeding deprived of the free use of their property for sale outside the State of Kansas, and that this allegation not having been denied by the ap-

pellees in their affidavits submitted on the question of removal, must be taken as true.

But to this we reply—*First*, that the question of removal depends upon the pleadings in the State Court and upon the allegations of the petition for removal, and not upon the affidavits, and that there is no provision or room under the removal act for any plea in abatement to the petition for removal. There is no such practice. The plea performs no office under the removal act, and the appellees were not called upon to answer its allegations, nor are they bound by not denying them; and *Second*, and more important, no such discrimination is contained in the act; it does not permit manufacture within the State for sale out of the State. It absolutely prohibits the manufacture within the State for sale anywhere, except for the excepted purposes for which sale can only be made by druggists within the State. It undertakes to make the manufacture within the State for sale out of the State a crime just as much as for sale within the State; and the Attorney-General is not authorized by any such allegation in his plea to license manufacture within the State for sale outside of the State.

In truth, as to *beer* and its manufacture and sale, the act of Kansas is absolutely prohibitory, for it is impossible to suggest the idea of its manufacture and sale for scientific or mechanical purposes, and absurd to consider it as manufactured or sold for medical purposes. If it should ever be prescribed by a physician it would not be in any sense as a medicine, but as a food or beverage, like tea or coffee. The act did therefore absolutely prohibit the appellees from the only use of their property of which it was susceptible, and by its operation substantially deprived the appellees of the value of such property.

It is admitted that at the time the appellees made their purchase and improvements and until the passage of the Act of 1881, the manufacture of beer in Kansas was unrestricted. It was a useful and legitimate industry, and encouraged and protected by the laws of the State as much as any other trade or business in which its citizens were engaged.

The first question, then, submitted to the Court, in a

proceeding instituted in *equity* under the thirteenth section of the Prohibitory Act of Kansas against the property and the persons of the appellees, is whether the enactment contained in that section is not in violation of the Contitutional provision that no State shall deprive any person of liberty or property without due process of law.

The precise question thus presented at the outset does not involve the inquiry whether the police power of the State is adequate to prohibit by legitimate means the manufacture and traffic in intoxicating liquors; but, assuming that to be so for the moment, for the sake of the argument on this point, can it do so as against the property and persons of the appellees in the *manner* and by the *process* enacted for the purpose in the thirteenth section of the act; and we submit as our

First Point

That the entire scheme of the thirteenth section which attempts by mere legislative enactment to convert the building and machinery of the appellees into a common nuisance, and to compass their destruction, and also attempts to execute the criminal law against the persons of the appellees, by equitable proceedings instead of a common law trial, is an attempt to deprive these persons of their property and their liberty without "due process of law," and is therefore absolutely void; and that the Circuit Judge was right in refusing to exercise the equity powers vested in the Circuit Court for either of such purposes.

A careful examination of the thirteenth section, in connection with the rest of the act, discloses that it is a distinct legislative scheme, additional to the ordinary methods of trial, conviction and punishment, provided by the other sections of the act, and strikes by novel methods at the property of those engaged in the manufacture, thus presenting a question which, so far as we can find, has

never been considered by this Court in any case cited on the brief filed on the part of the State, or in any other case.

The other sections of the act provide for the trial, conviction, sentence and punishment of offenders against its edicts by ordinary common law methods, and are not now here for consideration, but, by this section, the Legislature finding a brewery within the State in actual operation—which up to the time of the passage of the act was a lawful and protected industry—*eo instante*, without notice, trial or hearing, by the mere exercise of its arbitrary caprice, declares it to be a common nuisance, and then prescribes the consequences which are to follow inevitably by judicial mandate commanded by the statute, and involving and permitting the exercise of no judicial discretion or judgment. The brewery being found in operation, the Court is not to *determine* whether it is a common nuisance, but under the strict behest of the statute is to *find it* to be one. It is not the liquor made or the making of it which is thus enacted to be a common nuisance, but the place itself, including all the property used in keeping and maintaining the common nuisance—embracing the building, machinery, instruments and material without distinction. The judge having thus signed without inquiry—and it may be against the fact and against his own judgment—the edict of the Legislature, the Court is commanded, by its officers, to take possession of the place and shut it up; and, lest the possession of the Court and the closing of the establishment should not be sufficient security against the continuance of the business, the abatement of the nuisance is to be completed by the destruction, by the marshal, of all the property; and he has no discretion but to destroy the whole. He cannot stop short at the liquor, or the glasses, or the kegs, but must demolish all property used in keeping and maintaining the nuisance. Nor is all this destruction of property, by legislative edict, to be made as a forfeiture consequent upon conviction of any offence, but without the intervention of any real judicial action, and merely because the Legislature so commands.

So much of the scheme of the section is directed against

the property of the brewers, but what follows, directed against their personal liberty, is equally extraordinary.

By the 7th, 8th and 9th sections of the act, complete provision is made for the punishment *after conviction* of all who shall either manufacture or sell without a permit, or, having a permit, shall sell for any but the excepted purposes. But the thirteenth section provides that in an *equitable* action, commenced for the abatement of the nuisance, which may be instituted by the Attorney-General, county attorney, or any citizen of the county where the nuisance exists, an *injunction* shall issue at the commencement of the action, which of course can only be an injunction against the *crimes* of manufacturing and selling; and as all liquors that are manufactured or sold must be manufactured or sold in some place, it may apply to any offenders. And for a violation of the *injunction*, that is, for the *crime* of manufacturing or selling, punishment as for *contempt*, by the process of a court of *equity*, is to follow, which *may be a much more severe penalty than is prescribed as the penalty upon trial and conviction* for keeping or maintaining the nuisance, for the latter may be a fine of five hundred dollars and imprisonment in the county jail, not more than *ninety days*, while the former may be an *equal fine* and imprisonment for *six months*.

The act does not make the trial and conviction for keeping and maintaining the nuisance a condition precedent to its abatement, or to the suit in equity in which these penalties may be inflicted; but, as in the case of these appellees, *equity is invoked at the outset*, to register the edict of the Legislature, that the place is a common nuisance, to take possession of the property and destroy it, and *to punish the criminals* by fine and imprisonment.

It was for the exercise of these extraordinary processes that Judge BREWER refused the aid of his Court, and the State appeals to this Court to compel their exercise.

As to the proceedings *in rem* for the condemnation, forfeiture and destruction of the property as a punishment for the *crime* of using it for the manufacture of beer, if the Legislature really intended to accomplish that purpose, as the present case assumes, without any conviction first

had, or any trial in a form known to the law, by the intervention of a *court of equity*, in a bill filed against the owners, we submit that it is a clear case of depriving the owners of their property without due process of law; and this, assuming that it is within the proper province of the Legislature to prohibit within the State all traffic in intoxicating liquors, and to declare the manufacture and sale of them to be nuisances.

In connection with section 13, and as regulating whatever proceedings provided by it are to culminate in the confiscation and destruction of the property, it is to be especially noted that section 14, amending original section 21, expressly provides for all cases that—

> "it shall not be necessary in the first instance for the State to prove that the party charged did not have a permit to sell intoxicating liquors for the excepted purposes"—

i. e., that the State shall not be required to prove the one fact which constitutes the offence intended to be punished by the act by loss of liberty and of property; and the presumption of innocence is thus taken away from the party charged.

In *Fisher* v. *McGirr*, 1 Gray, 1, which brought under review the prohibitory act of Massachusetts of 1852, principles are laid down in the unanimous opinion of the Court, delivered by SHAW, *Ch. J.*, which are entirely applicable to the case at bar.

> "Supposing the process *in rem*, when rightly conducted, to be a suitable and proper mode of enforcing obedience to a useful and salutary law, it does it by punishing the offender who must be the owner, or some person intrusted with the possession by him, or some person for whose unlawful possession the owner is responsible; it does this by depriving such owner of his property, at the same time preventing the further noxious and unlawful use of it. *Such being the character of the prosecution in a high degree penal in its operation and consequences, it should be surrounded with all the safeguards necessary to the security of the innocent, having the full benefit of the maxim, that every person shall be pre-*

sumed innocent until his guilt be established by proof. He should have notice of the charge of guilty purpose, upon which his property is declared to be unlawfully held, and in danger of being forfeited, a time and opportunity to prepare his defense, an opportunity to meet the witnesses against him face to face, and the benefit of the legal presumption of innocence.

"But there is another objection to the constitutionality of this law of a more formidable character, and as it appears to us quite decisive of the case. Supposing the owner of the liquor to have full notice, to have appeared before the magistrate, and to have had full opportunity to procure evidence and prepare for trial, no provision is made by the statute for a *trial*, for a determination by judicial proofs of the facts upon the truth of which alone the property can justly be confiscated and destroyed. On the contrary, the statute expressly directs that, if the owner fail to appear, or if he does appear, unless he shall prove that the liquors were lawfully kept, they shall be declared forfeited, and the owner shall be adjudged to pay a fine and costs * * * To see whether any *trial* is provided for we must first ask what is to be tried. The case supposes that the keeping of spirituous liquors intended for sale is made unlawful by the statute itself; that the illegality consists in the intent of selling; that the intent qualifies the act of keeping, and impresses on the property illegally kept the character of a nuisance, which makes it lawful to seize the property thus made the instrument of an illegal purpose, and confiscate and destroy it. This is done as well to prevent and abate the nuisance and prevent the illegal use of it as to punish the owner upon whom ultimately the loss must fall, by a deprivation of property in the nature of a penalty. What, then, is the fact upon which any adjudication must proceed? Clearly, keeping with an intent to sell. * * * The fact then to be proved, the main, the indispensable fact, in order to render the keeping illegal and without which there is no legal ground for a penal judgment, is the intent of the owner or other person in possession of the property, to sell it in violation of the law. Now, we can perceive no provision for the trial and proof of this offence of keeping liquors with illegal intent in any sense in which a judicial trial is understood, in which a party charged with an offence for which his

> property may be taken from him and confiscated, may stand on his defense and have the presumption of innocence until proofs are adduced against him to establish the crime *or misdemeanor* with which he is charged. *Such a trial alone* can satisfy the express provision in the Declaration of Rights, Art. 12, which declares that no subject shall be arrested or deprived of his property, immunities or privileges, or of his life, liberty or estate, but *by the judgment of his peers or the law of the land. These expressions have been understood from Magna Charta to the present time to mean a trial by jury in a regular course of legal and judicial proceedings.*"

And *there* the only attempt of the Legislature was to confiscate and destroy the property as a forfeiture and penalty by way of punishment, after trial and conviction of the owner.

Here the proposition is, that, *without any proceeding at common law* to charge the owner or keeper with a violation of the statute, in a proceeding begun by a *bill in equity*, in which it shall not be necessary to allege, or on the trial in *equity* to prove, the *one indispensable fact* constituting the offence to be punished, viz.: "That the party charged did not have the permit to sell intoxicating liquors for the excepted purposes," the punishment of forfeiture and destruction of property may be inflicted by the decree of a court of *equity*.

Surely this is a novel mode of administering *criminal law*. And that it is *criminal law* that is here being administered there can be no doubt.

In the case last cited, SHAW, *Ch. J.*, says (p. 26):

> "Supposing the object to be a legitimate one to prevent and punish the possession of intoxicating liquors which leads to temptation and facilitates the actual commission of the offence of unlawfully selling by declaring that possession unlawful, if held with an intent and purpose of selling unlawfully—we have said that this system of measures seems designed to accomplish this one purpose by two distinct modes or courses of proceeding, both well known to the law, but of considerable difference in their modes of operation; they are a proceeding *in*

rem, by the sequestration, and forfeiture of the property or thing which is noxious in itself or made the instrument or subject of a noxious or injurious use; the other a proceeding *in personam* for the punishment of the person of the offender, as an example to deter others from the commission of the like offence. *Both are proceedings for the enforcement of the criminal law, and must be governed by the rules applicable to its administration.*"

And CURTIS, *J.*, in *Greene* vs. *Briggs*, 1 Curtis, 328, having the liquor law of Rhode Island under discussion, said:

"These proceedings are *clearly criminal* in their nature. Their object is to inflict upon the person fine or imprisonment, and, at the same time, to adjudicate a forfeiture of the liquor. The process and the judicial action under it are directed both against the offender and his property."

And again (p. 331):

"If this were simply a proceeding to forfeit property, it would nevertheless be a *criminal prosecution* within the meaning of this clause in the Constitution, and the owner would be entitled to a *trial by jury*."

And the Supreme Court of Michigan, in *Hibbard* vs. *The People*, 4 Mich., 129, in considering the liquor law of that State in reference to its constitutional provision that "no person shall be deprived of life, liberty or property without due process of law"—the very words of the Fourteenth Amendment—after citing, as applicable to the case, the statement of Mr. Justice BRONSON in *Taylor* vs. *Porter*, 4 Hill, 147, "that the words 'due process of law' in this place cannot mean less than a prosecution or suit conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property" says:

"That this is *clearly a criminal proceeding* within the meaning of the Constitution, we can entertain *no doubt*. It is instituted for the purpose of forfeiting the property on the ground that it is kept for

> an illegal and criminal purpose. The party must be tried and convicted of an offense which the statute declares to be a misdemeanor before judgment of forfeiture can be declared; and such forfeiture is imposed as a part of the punishment for such offense. It makes no difference in its character that the form of the proceeding for the recovery of the pecuniary penalty or forfeiture is assimilated to a civil action. The issue is, 'guilty or not guilty,' and the penalty is imposed as a punishment for an offense."

And further:

> "It is said that the proceedings under the liquor law may be so conducted, consistently with its provisions, as to secure the person whose property is seized all his constitutional rights. If this is *possible*, that is not enough. The law must afford to the accused the means of *demanding* and *enforcing* his constitutional rights, and if it authorizes a course of procedure which could deprive him of them it is *void*. It is not to be left to the discretion of prosecutors or magistrates to adopt a course of procedure which may or may not be in conformity with the requirements of the Constitution as they may elect."

See also—

Neitzell v. *City of Concordia*, 14 Kan., 446.
Boyd v. *U. S.*, 116 U. S., 616.

And so, with the same intent, Chief Justice SHAW had said, 1 Gray, 39:

> "In order to judge of the conformity of an enactment with the requisites of the Constitution we must be governed by the terms and provisions of the act itself, and cannot construe it according to any presumed intention of the Legislature, not expressed."

We submit, therefore, that it was not within the power of the Legislature of Kansas, by resorting to the device of *enacting* a brewery in operation to be a nuisance, to enable a court of equity by its decree to convict a citizen of a rime, and to punish him by the confiscation and destruc-

tion of his property, and that the Court below properly refused to exercise the power, deeming the enactment void.

In short, there would seem to be no difference, in a case of this character, between a *legislative declaration* that a certain occupation or structure is a nuisance, and a similar declaration by a municipal body, which is simply a legislative agent. *Such a declaration cannot make that a nuisance which is not such in fact.* To make such a determination is to adjudicate upon the facts, and that is purely a *judicial* function. Unless the mere existence of this brewery and its use for brewing beer are *in themselves* nuisances, by reason of the fact that they are *injurious* to the health or morals of the community, a *legislative edict* cannot adjudge them to be such.

Rights of property cannot be in this way "arbitrarily or capriciously destroyed or injured."

Yates v. *Milwaukee*, 10 Wall, 497, 504–505.
Hutton v. *City of Camden*, 39 N. J. Law (10 Vroom), 122, 129–130.
Cooley on Const. Lim. (5th Ed.), p. 110, and cases cited.

"Forfeitures of rights and property cannot be adjudged by legislative act, and confiscation without a *judicial* hearing, after due notice, would be void, as not being due process of law."

Cooley on Const. Lim. (5th Ed.), p. 446.
Lowry v. *Rainwater*, 70 Mo., 152.
Ieck v. *Anderson*, 57 Cal., 251.

Such a legislative determination would also be void, because, where the *fact* of injury to public health or morals did not exist, as here, it would be an interference with the absolute right of every American citizen to adopt and follow such pursuit as he sees fit, provided it be *not, in fact,* "*injurious to the community.*"

People v. *Marx*, 99 N. Y., at p. 386, and cases cited.

Here, the legislative edict is to be carried out, not through the instrumentality or machinery of a municipal

government, but through the agency of a court of equity, which is to act, *not as a court of justice*, but simply as a legislative agent, to register the decrees of a legislative body.

Indeed, such legislation has been expressly decided to be unconstitutional in the case of a *purely legislative declaration* or adjudication that certain property is a nuisance.

In *Quintini* v. *City of Bay St. Louis* (Supreme Court of Miss., March 7, 1887), 1 Southern Reporter, 625, where the Legislature sought to declare private residences to be nuisances, because they had a tendency to depreciate the value of neighboring property and to obscure the view of the same, the Court very sensibly held that the Legislature had no such power, saying (p. 628):

> "That the Legislature in the exercise of the police power may prohibit, in particular localities, such *use* of property as is injurious to public health, is admitted, and what it may do may also be authorized to be done by the local authorities; but it does not follow that it may, *by a mere declaration*, convert the *harmless, proper and ordinary use of property* into a *nuisance*. Where the *use* of the land furnishes the test for the determination of the constitutionality of the law, *the Legislature may not conclusively determine the effect to be harmful.* This would be the assumption of *judicial functions* by the legislative department, and, if yielded to by the Courts, would be an abrogation of those duties and powers committed by the Constitution to the judicial department, and the untrammeled exercise of which is essential for the preservation of life, liberty and property."

The Court, therefore, held that this statute was a mere attempt to dedicate private property to public use without compensation, and was therefore void.

This case is so precisely applicable to the present, that little can be added by way of argument. In fact, the mere statement of the proposition, that the Legislature cannot declare that property to be a nuisance which in its *use* is not such in fact, furnishes its own demonstration. It is a plain application of a fundamental principle of con-

stitutional law, requiring that the dividing lines between the departments of government shall be forever kept intact.

As to the proceedings against the *person*, the provisions of the thirteenth section are in equally flagrant violation of the Constitutional mandate that no State shall "deprive any person of life, liberty or property *without due process of law.*"

They are simply a method contrived to punish *crime, without a trial*, by the intervention of a *court of equity.*

The manufacturer, or the seller, who keeps or maintains a place where intoxicating liquors are manufactured or sold, commits no other or different offense from that of simply manufacturing or selling; but, by the interposition of an injunction, he is to be punished by fine or imprisonment, or both, in the discretion of the Court—not however according to the judgment of the Court, for, however slight or excusable his violation of the law, his *punishment* is fixed by the law at not less than one hundred dollars, or not less than thirty days' imprisonment, and all the power of the Chancellor will not suffice to remit or diminish it.

It is a clear case of fine and imprisonment inflicted by statute for crime committed, but all safeguards known to the common law for the protection of innocence denied, and the office of imposing it conferred upon a *court of equity*, so as to avoid a trial by jury.

As well might the State assume to treat and punish any other crime in the same fashion; and what would be thought of an act of the State Legislature authorizing a court of equity to issue an injunction against theft or burglary and to punish the offense, when committed as a contempt, by fine and imprisonment, the amount and term of which was measured out by the statute?

As applicable both to proceedings against the property and to those against the person, under this thirteenth section, it may be stated as a general proposition, requiring little argument for its support, that the criminal law cannot be administered by or through courts of equity.

The jurisdiction of a court of equity in cases of public nuisance, properly so called, is exceptional, and extremely

limited in its application. Even in cases where the jurisdiction can be invoked—

> "the question of *nuisance or not* must, in cases of doubt, be *tried by a jury;* and the injunction will be granted or not *as that fact is decided.*"
> 2 Story's Eq. Jur., § 923.

In practice, this jurisdiction is applied almost exclusively to nuisances in the nature of *purprestures* upon public rights and property, as, for instance, encroachments upon highways, public rivers, streets, squares, bridges, docks and other public accommodations, and is exercised chiefly through an information at the suit of the Attorney-General.

2 Story's Eq. Jur., §§ 921–924.

But this jurisdiction is not exercised on any idea that the nuisance in question is a *crime*, or with a view of preventing or punishing a criminal act.

1 Bish. Crim. Proc., § 1417.

And this is so for the very reason that, as LORD ELDON said, *a court of equity "has no jurisdiction in matters of crime."*

Lawrence v. *Smith*, Jacob, 471, 473.

Referring to the act sought to be enjoined in that case, he said:

> "I have nothing to do with it as a crime."

See also 2 Swanston, 413.

As Chancellor WALWORTH emphatically held, the Court of Chancery will not interfere to enforce the penal laws of the State, unless the act sought to be restrained is *in itself a nuisance.*

Mayor, &c., of Hudson v. *Thorne*, 7 Paige, 261.

In a case where it was sought to restrain an officer of the Society for the Prevention of Cruelty to Animals from

making a threatened arrest, the Court of Appeals of New York said:

> "Whether a person accused of a crime be guilty or innocent, is to be determined in a common law court, *by a jury;* and the people, as well as the accused, have the right to have it thus determined. If this action could be maintained in this case, then it could in every case of a person accused of crime, where the same serious consequences would follow an arrest; and the trial of offenders in *the constitutional mode* prescribed by law could forever be prohibited. * * * *This action is absolutely without sanction in precedents or principles of equity.*"
>
> *Davis* v. *Am. Soc., &c.*, 75 N. Y., 362, 368; followed (1886) in—
>
> *Kramer* v. *Police Dep't of N. Y.*, 53 N. Y. Super. (21 J. & S.), 492.

Mr. Bishop declares that—

> "The doctrine is believed to be, without exception, that the department of our jurisprudence known as *equity, pertains to civil affairs alone, having no connection with criminal.*"
>
> 1 Bish. Crim. Proc., §§ 1412–1417.
>
> See also 1 Spence's Eq. Jur., *689–*690.

With these general principles in mind as constituting "*the settled course of judicial proceedings,*" that is, "due process of law"—

> *Murray's Lessee* v. *Hoboken L. & T. Co.*, 18 How., 280—
>
> *Walker* v. *Sauvinet*, 92 U. S., 90, 93—

the Fourteenth Amendment to the Federal Constitution was adopted, providing that no State shall "deprive any person of life, liberty, or property without *due process of law.*"

> "On principle, therefore," as Bishop says, "*this provision secures jury trial* in the States in all cases in which at the time of its adoption such trial was deemed a fundamental right."
>
> 1 Bish. Crim. Proc., § 891.

But this Court has declared that—

> "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State."
>
> *Walker* v. *Sauvinet*, 92 U. S., 90, 93.

Accepting this declaration in its narrowest sense, and bearing in mind that it is a fundamental principle that a court of equity will not interfere with the administration of the criminal law, we find also, if that shall be deemed of any consequence, that, not only by the common law, as universally administered elsewhere, "*the settled course of judicial proceedings*" involved the right to a jury trial in every criminal case, but that the same was a fundamental right, *in the State of Kansas*, at the time of the adoption of the Fourteenth Amendment in 1868, as well as at the time of the commencement of these proceedings and the passage of this law

The Constitution of Kansas was adopted July 29, 1859. Section 5 of the Bill of Rights of that Constitution declares that—

> "*The right of trial by jury shall be inviolate.*"

Section 10 of the Bill of Rights provides that—

> "In *all prosecutions* the accused shall be allowed to appear and defend in person or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and a speedy *public trial by an impartial jury* of the county or district in which the offense is alleged to have been committed. No person shall be a witness against himself, or be twice put in jeopardy for the same offense."

See Compiled Laws of Kansas (1885), pp. 48-51.

The Supreme Court of Kansas has declared this Bill of Rights to be something more than a mere collection of glittering generalities, and that no act of the Legislature

is valid which conflicts with its provisions or trenches upon the political truths which it affirms.

Atchison Street Railway v. *Missouri Pacific Railway*, 31 Kan., 660.

It is also firmly established in that State, as elsewhere, that these provisions mean that—

> "A jury trial is preserved in *all cases in which it existed prior to the adoption of the Constitution.* It does not extend the trial by jury, it simply *preserves* it. It remains inviolate; that is, not disturbed or limited."
>
> *In re Rolf's Petitioner*, 30 Kan., at p. 762.
> *Kimball* v. *Connor*, 3 Kan., 415, 432.
> *Ross* v. *Connors, &c.*, 16 Kan., at p. 418.

It has been well said:

> "*That which a Legislature cannot do directly it cannot do indirectly. It may not deprive a party charged with a criminal act of his constitutional right to have the truth of that charge determined by an impartial jury of the district.* * * * No more can it authorize a municipal corporation, one of its creations, to punish a party for a criminal matter without *in some way securing to him a jury trial.* So long therefore as the fundamental law contains the guaranty which it does, I think no party can be subjected to a prosecution for an act of a criminal nature, whether that prosecution be brought by the State directly, or any corporation created by the State, without, in some way, and before some tribunal, being secured an opportunity of having the truth of that charge inquired into by *an impartial jury* of the district."
>
> BREWER, *J.*, *In re Rolf*, 30 Kan, at p. 763.

A prosecution for a matter made penal by the laws of the State, as *for selling liquor without a license*, is "*unquestionably a criminal action.*" It was so expressly held in—

Neitzell v. *City of Concordia*, 14 Kan., 446, 448.

In re Rolf, 30 Kan., at pp. 760–761.

It would seem that nothing more need be said. If the Legislature cannot accomplish *indirectly* what it cannot do directly, how is it possible for it to deprive a party of his right to a jury trial simply by authorizing a court of equity to take jurisdiction of the particuliar case? It is submitted, therefore, that there is not the slightest doubt that, by the statute in question, the Legislature of Kansas has violated fundamental principles, the "settled course of judicial proceedings," and the law of the land, and that the statute is therefore unconstitutional and void.

If the propositions already expressed should meet with the approval of the Court, they would necessarily be decisive of the case, and require the affirmance of the decree appealed from. As a law of criminal procedure applied to the punishment of offenders against its provisions, it would be held to be a fatal departure from "due process of law," and therefore void.

And, upon the one point, that the provision of the Fourteenth section, which "in all cases" dispenses with proof in the first instance on the part of the State, that the party charged did not have a permit, which is "the one indispensable fact" constituting crime under the act, thereby taking away the presumption of innocence, which is the fundamental right of every person charged with crime, not only is the thirteenth section unconstitutional and void, but all other parts of the act are equally so.

But there is a broader question presented by the record, and by the elaborate opinion of the learned Circuit Judge in the *Walruff Case*, in adherence to which he dismissed the bill in this case, which demands the consideration of the Court—a question which, as we think, has never been passed upon here, but has been designedly and carefully reserved for decision when some case should come here which fairly presented it, as we insist that the present record does. That question is, whether the act in question, as a whole, including, of course, the special provisions of the thirteenth section which have been considered, does not, without regard to the special *method and process* prescribed

by the thirteenth section, operate to deprive the appellees of their liberty and property without due process of law, within the meaning of the Fourteenth Amendment.

In maintaining the affirmative of this proposition, we do not subject ourselves to the censure implied in the language of Mr. Justice MILLER, in *Davidson* vs. *New Orleans*, 96 U. S., 97, when he said:

> "In fact it would seem from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this Court, the abstract opinions of every unsuccessful litigant in a State Court of Justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

We are not here as unsuccessful litigants, but sustained by the deliberate, well-considered and frequently repeated decision of a very able and learned Circuit Judge, that this particular statute of Kansas is a law operating so rigidly on the appellees' property in existence at the time of its passage, absolutely prohibiting its use, and annihilating its value, as to amount to depriving the owners of their property and confiscating it; and it is the State of Kansas hat comes here as an unsuccessful litigant seeking to overthrow this decision, and maintain her severe and arbitrary enactment. She comes, too, with the almost fatal concession of her own court of last resort, that her Legislature in passing the act in question—

> "has gone a long way *in destroying the value of such kind of property as the defendant owned, and has possibly gone to the utmost verge of constitutional authority*," *vid.*, opinion of Valentine, *J.*, Atty. Genl's Brief, p. 21.

In a matter so sacred as the preservation of the citizen's fundamental rights to liberty and property, the ultimate protection of which is now intrusted to this Court, it will not refuse to scrutinize with the utmost care a law of a State which its highest judicial authority concedes to trespass upon the "utmost verge" of the State's constitu-

tional power. The "utmost verge" is a very dangerous place at which to practice an experiment on constitutional rights and principles. The only safety for the citizen is that the States should keep within that critical line. A single step beyond that Rubicon is a fatal invasion.

Assuming the police power inherent in the States to be as far reaching and indefinable as to the subject matter on which it may be exercised, as this Court has ever admitted it to be, and that the regulation and even the prohibition of the traffic in liquor are fairly within it, the question upon each particular State law that is brought to the test of the judgment of this Court, is, whether in its principle and in its methods, it is within the legitimate exercise of that power, or whether it goes beyond it, and under the pretext and cover of a police regulation unnecessarily and therefore unlawfully invades the domain of private property. Other prohibitory laws, even all prior liquor laws of other States, may have kept within the limits, and yet this particular law of Kansas, which far surpasses in its arbitrary severity all prior enactments which have been brought to our notice, may be justly obnoxious to the condemnation which the Circuit Court has pronounced upon it.

The facts, therefore, of this particular case, and the details of this particular statute, are a material preliminary to the statement and consideration of the question.

The appellees were brewers with no other calling or means of support. In 1871 while as yet beer was as much a part of the daily food of the people of Kansas as bread and meat, they purchased a brewery in that State of which they were citizens, investing in it their entire property. From time to time they enlarged and improved it, adding largely to their investiment. Meanwhile the taxes on their property and business contributed to the support and welfare of the State as the products of their brewery did to the wholesome sustenance of its inhabitants. It was a peaceful and legitimate industry, as beneficent as the bakers' or the butchers'. Contributing to the community what for centuries had been a staple beverage of the Anglo-Saxon race. The markets of the whole country were open to them. They were not confined to the supply of consumers

in Kansas. They could sell their beer produced at their brewery in every other State of the Union. The tenth census of the United States shows the value of that right, for the total markets of the United States outside of Kansas absorbed more than one hundred millions of dollars. For this business their brewery was very valuable property. It was worth with its equipments sixty thousand dollars. The structure of building and character of machinery and implements required for a brewery are so peculiar that they cannot be used or adapted for any other purpose. For any other purpose the property was practically worth nothing. If it could not be used at all as a brewery it was worth not more than five thousand dollars.

The appellees being in this situation, in November, 1880, the people of Kansas, at a popular election, adopted this constitutional amendment:

> "The manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific and mechanical purposes."

And in February, 1881, the Legislature passed the Act which, as amended in 1885, is now in question.

As to beer, the act practically absolutely prohibits the manufacture of beer within the State for export or sale outside of the State, or for the manufacturer's own consumption within it; in fact, it practically prohibits its manufacture *for any purpose* within the State. For although there is a proviso that such liquors may be *sold* for medical, scientific and mechanical purposes, this proviso can have no application to *beer*, because in the nature of things beer cannot possibly be used for scientific or mechanical purposes. So a permitted manufacturer may make and sell it only to a permitted druggist, who can sell only in the county of his residence, to a patient upon the prescription of a permitted physician resident in the same county. But if the physician writes a prescription for the purpose of enabling or assisting any person to obtain the beer for use as a beverage, he shall be guilty of a misdemeanor to be punished by fine and imprisonment. Now, as beer was never, like spirits, prescribed as a medicine, but could only be recommended as a beverage

like any other known article of food, it is evident that the prohibition of the statute as to the manufacture and sale of beer within the State is practically absolute. The act punishes it as a misdemeanor by fine and imprisonment, and as we have seen by a confiscation and destruction not merely of the particular liquor manufactured or intended to be sold in violation of the act, but of all intoxicating liquor found in the place, however innocently it may have come there; and not merely the liquors and the vessels containing them, but also all property used in keeping or maintaining the place, including, necessarily, the building and machinery, which, instead of the liquor, it enacts into a common nuisance.

We therefore undertake to establish as our—

Second Point,

That within the meaning of the Fourteenth Amendment this act deprived the appellees of their liberty and property without due process of law, and that it abridged the privileges and immunities of the appellees as citizens of the United States.

We claim also as part of this proposition, and in support of it, that at the time of the passage of the act, it was one of the fundamental rights of the appellees as citizens to pursue their calling of manufacturing beer and to use their brewery for that purpose, and that the State could only restrain the exercise of this right by virtue of the police power]; that that power could only be exercised to the extent reasonable and necessary for the promotion of the object for which it was exercised, viz., the preservation and promotion of the morals and the health of the people of Kansas; that this act goes far beyond what is so necessary and reasonable, and that in such excess it invades the rights of the appellees and deprives them of their property; that it destroys their property for the public use

other than for police purposes; that it does this without compensation; that such destruction, not demanded by any legitimate exercise of the police power, is depriving them of their property without due process of law.

At the outset, it should be borne in mind that "constitutional provisions for the security of person and property should be liberally construed." It is the duty of the courts to be watchful of constitutional rights and "against any stealthy encroachments thereon."

Boyd v. *U. S.*, 116 U. S., at p. 635.

As to the general intent of the Fourteenth Amendment, "that there should be no *arbitrary deprivation* of life or liberty, or *arbitrary spoliation* of property", see

Barbier v. *Connolly*, 113 U. S., at p. 31.
Yick Wo v. *Hopkins*, 118 U. S., 356.

But it is said that prior decisions of this Court have decided the question, and that it is no longer open for argument here. This we deny. The Circuit Judges of the United States are not in the habit of attempting openly to overrrule the decisions of this Court.

And the case of the *Beer Company* vs. *Massachusetts*, 97 U. S., 25, is cited as conclusive of this case.

But the only question there decided was whether the liquor law of Massachusetts, of 1869, impaired the *obligation of the contract* previously entered into between the State and the Beer Company by its charter. And it was held that the power to repeal or modify, reserved to the Legislature in the charter of the company, rendered the contract subject to the exercise of that power; and that the exercise of the police power contained in that statute of Massachusetts was a legitimate one. But that statute was nothing like this act of Kansas. It did not undertake to prohibit the manufacture of beer by the company. On the contrary, there was in that act a *special provision permitting the free manufacture of it for exportation from the State.* There was *not any deprivation or destruction of the company's property*, or of the use of its brewery. And in this Court the counsel of the company *expressly*

limited its claim to protection to the *contract clause of the Constitution.* This was his language as reported at p. 27: "*The company does not invoke the aid of the Fourteenth Amendment to the Constitution*, but submits that the statute of 1869, under which the liquor was seized and condemned, *impairs the obligation of the contract* contained in its charter, and is, therefore, unconstitutional and void."

So in *Bartemeyer* vs. *Iowa*, 18 Wallace, 129, reference to which is made by the Court in the former decision. Although the attempt was made to induce the Court to pass upon a moot case somewhat resembling this, the Court refused to do so. The question of manufacture and of effect on the property of the manufacturer was not involved, and the case as decided was the ordinary question of the constitutionality of a State law regulating the sale.

The utterances of all the judges who delivered opinions in that case carefully reserved the judgment of the Court on the question here involved.

Mr. Justice MILLER, in delivering the opinion of the Court, while declaring that—

> "The weight of authority is overwhelming that no such immunity existed as would prevent State Legislatures from regulating and even prohibiting the *traffic* in intoxicating liquors—"

recognizes—

> "the solitary exception in the case of *a law operating so rigidly on property in existence at the time of its passage as to amount to depriving the owner of his property.* But if it were true," he says, "and were fairly presented to us that the defendant was the owner of the glass of intoxicating liquor which he sold at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquor, then we can see that two very grave questions would arise, viz.: 1. Whether this would be a statute depriving him of his property without due process of law, and (2) whether it would be so far a violation of the Fourteenth Amendment in that regard as would call for judicial action in this Court."

And Mr. Justice FIELD, concurring, specially says:

> "I have no doubt of the power of the State to regulate the sale of intoxicating liquors, *when such regulation does not amount to the destruction of the right of property* in them. The right of property in an article involves the power to sell and dispose of such article *as well as to use and enjoy it.* And any act which declares that the owner shall neither sell nor dispose of it, *nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any State the Fourteenth Amendment affords protection.*"

And Mr. Justice BRADLEY said:

> "The law therefore was not an invasion of property existing at the date of its passage, and the question of depriving a person of property without due process of law does not arise. No one has ever doubted that a Legislature may prohibit the *vending* of articles deemed injurious to the safety of society, *provided it does not interfere with vested rights of property. When such rights stand in the way of public good they can be removed by awarding compensation to the owner.*"

The *License Cases*, in the 5th of Howard's Reports, involved solely the question whether the license laws there under consideration were in violation of the *commerce* clause of the Federal Constitution, and the opinion of the Court delivered by TANEY, *Ch. J.*, will be found to be *limited strictly to that question*, which was decided in the negative.

The *Slaughter House Cases*, 16 Wallace, 36, did not touch the question now before the Court. They involved solely the question of the competency of the police power reserved to the States to regulate the place and the manner of landing and slaughtering of cattle within a limited district of the State, and it was maintained by the majority of this Court that this power went to the extent of permitting the conferring of an exclusive monopoly of that business upon a single corporation. The four dissenting justices dissented upon the ground that the persons al-

ready engaged in that business, who were excluded from the monopoly, were by the law deprived of their privileges and immunities which belonged to them as citizens of the United States, and were deprived of their property without due process of law. But Mr. Justice MILLER, speaking for the majority of the Court, met this proposition at the outset by denying it as a matter of fact, and demonstrated that all persons without distinction *could still pursue their business* of slaughtering within the regulations of the act.

And in the subsequent case of *The Butcher's Union Co.* vs. *The Crescent City Live Stock Landing Company*, 111 U. S., 746, where the State passed a subsequent act overthrowing the monopoly which they had before created, the only point involved was whether the act *impaired the obligation of the contract* by which the Crescent City Co. had been created; and it was held that the new statute was not a violation of the *contract clause* of the Federal Constitution, because the former act creating the monopoly, which had been held to be a just and reasonable exercise of the police power of the State, was still subject to the further exercise of that power when the welfare of the State should, in the judgment of the Legislature, demand it; and that the new act depriving the Crescent City Co. of its monopoly, was only a further just and reasonable exercise of that power.

So the other cases relied upon in the brief on the part of the State, viz.: *Fertilizing Co.* vs. *Hyde Park* and *Stone* vs. *Mississippi*, 101 U. S., 814, arose and were decided under the *contract clause* of the Constitution, and, although they fully recognize the adequacy of the police power in the States to justify and maintain the statutes there in question, they have really nothing to do with the present case, which has to do with a wholly different statute, differing materially in principle and also in *methods*.

Assuming, therefore, the question presented in this case to be wholly open and undecided by any case heretofore passed upon by this Court, we, with deference, submit that the only principle that saves from condemnation, as

abridging the privileges and immunities of citizens of the United States, or depriving persons of their property without due process of law, State statutes which invade the peaceful occupations of citizens and the use by them of their property for purposes theretofore permitted and lawful, is the proper exercise of the police power by *legitimate and constitutional methods;* that, so far as such statutes do go beyond such proper exercise and outside of such *methods*, at any rate, they do still violate the Fourteenth Amendment, and entitle citizens, whose privileges are thereby abridged, to protection; that, when citizens are thereby deprived of their property, they are still deprived of it *without due process of law*, even though the power working that deprivation be called the *police power*; and that the present statute of Kansas, so far, at any rate, as it prohibits the use by the appellees of their brewery for the manufacture of beer, and enacts their building and machinery to be a public nuisance, and dooms it to *destruction* by the mere *fiat* of the Legislature, does transcend any legitimate exercise of the police power in regulating or prohibiting the *traffic* in intoxicating liquors, and is therefore void.

That there is a limit to the exercise of the police power in invading business and property in any given case, and that that limit is found in what is necessary and reasonable for guarding against the evil which injures or threatens the public welfare in the given case, and that the Legislature cannot, under the guise or pretext of a police regulation, go beyond that limit, and strike down innocent occupations and invade private property, the destruction and invasion of which are not reasonably necessary to accomlish the needed relief or the needed reform, are propositions sustained by abundant authority; and this, though allowing the Legislature to be in each case the judge of the extent to which the existing evil is to be regulated or prohibited.

Now, allowing the Legislature of Kansas to be the sole judge of how far they shall go in reforming the morals and the habits and regulating the appetites and prescrib-

ing the food and the drink of the people of Kansas, they certainly are not to be permitted to regulate the morals and the habits or the food and drink of the rest of the people of the United States, or the rest of mankind; and when, under the guise of a liquor law for their own people, they strike down occupations and deprive persons of property, which have no tendency even to affect the temperance of the inhabitants of Kansas, they do exceed their recognized powers, and come in conflict with the Fourteenth Amendment.

Where the occupation or property is *in itself* immoral or noxious to health or to safety, we make no question of the power of the Legislature to lay its hand upon them, and even in a proper case, to put them out of the way, and, where necessary, to destroy them.

As Chancellor Kent says in the often quoted passage (2 Kent, Com., 340):

> "Unwholesome trades, slaughter houses, operations offensive to the senses, the deposits of gun powder, the application of steam power to propel cars, the building with combustible materials and the burial of the dead, may all be interdicted by law in the midst of the dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community."

Nor do we need to gainsay any of the familiar propositions of law cited, and relied upon in the brief on the part of the State, as for instance:

> "That every citizen holds his property subject to the proper exercise of the police power * * * and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors or the citizens generally."
>
> Dillon on Munic. Corp., p. 136.

Or—

> "That it is not every use of land that comes within the Constitutional protection. One has a vested

right to only a reasonable use of one's land. He can only make use of his property in such a manner that he will not injure another. That any use of one's lands to the injury of another is a nuisance, and may be prohibited. And that the right to personal security against acts which will cause injury to health or great bodily discomfort cannot be made absolute in organized society, and it must yield to the reasonable demands of trade, commerce and other great interests of society."

Tiedeman Limit. Police Power (Sec, 122).

Or—

"That it is clearly within the legislative discretion whether the private interest or the public good shall yield in a case where the two are antagonistic, and to prohibit or permit the doing of what promotes the public welfare, and at the same time causes personal discomfort or injury, and that its judgment cannot be subjected to a review by the Courts."

Ibid. (Sec. 122 a).

Or—

"That it is competent for the Legislature to interpose, and, by positive enactment, to prohibit a use of property which would be injurious to the public."

Comm. vs. *Tewksbury*, 11 Metc., 55.

Or—

"That it can make no difference that the right is purchased previous to the passage of the law, or before it becomes necessary. That as these laws are usually enacted with a view to evils already existing, till the state of things is such as to render the act complained of a nuisance, upon actual experiment, no law is passed. That every right from an absolute ownership in property down to a mere easement is purchased and holden subject to the restriction that it shall be so exercised as not to injure others; and, though at the time it be remote and inoffensive, the purchaser is bound to know at his peril that it may become otherwise by the residence of many people in its vicinity, and that it must yield to by-laws, or other regular remedies for the suppression of nuisances."

Coates vs. *Mayor of New York*, 7 Cowen, 585.

But we do protest against the proposition cited from Bishop on Statutory Crimes (Sec. 995), for which no authority is quoted, viz.:

> "The State in the enactment of its law must exercise its judgment concerning what acts tend to corrupt the public morals, impoverish the community, disturb public repose, injure the other public interests, or even impair the comfort of individual members, over whom its protecting watch and care are required. And the power to judge of this question is necessarily reposed *alone* in the Legislature, *from whose decision no appeal can be taken directly or indirectly to any other department of the Government. When, therefore, the Legislature, with this exclusive authority, has exercised its right of judging concerning this Legislative question, by the enactment of prohibitions like those discussed in this chapter, all other departments of the Government are bound by the decision, which no Court has a jurisdiction to review. And the question of the wisdom of the enactment is definitely settled by the enactment itself.*"

This unqualified statement cannot be true. It would surrender and abandon all private interests to the arbitrary caprice or whim of a mere majority of the Legislature, and would compel the Courts to abdicate their legitimate function and duty of reviewing and annulling a law which, under the false pretence of being a police regulation, was not such in fact or in principle, but a merely unwarranted and unauthorized invasion of private rights. The propositions above cited must therefore be taken with the qualifications in this respect which have so often been put to them by Courts of the highest authority.

In *Fletcher* vs. *Peck*, 6 Cranch, 135, MARSHALL, Ch. J. said:

> "It may be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed where are they to be found, *if the property* of an individual fairly and honestly acquired may be seized without compensation?"

In *Calder* vs. *Bull*, 3 Dall. 386, Judge CHASE said:

> "I cannot subscribe to the omnipotence of a State Legislature or that it is absolute and without control, although its authority should not be restrained by the Constitution or fundamental law of the State. The nature and end of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require, nor refrain from acts which the laws permit. There are acts which the Federal or State Legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule *an apparent and flagrant abuse of legislative power:* as, to *authorize manifest injustice by a positive law or to take away that security for personal liberty or private property for the protection whereof government was established.*"

Again:

> "Under the power to regulate, the State cannot deprive the citizen of the lawful use of his property, if it does not injuriously affect or endanger others. We are unwilliug to concede the existence of an indefinable power, superior to the Constitution, that may be invoked whenever the legislature may deem the public exigency may require it, by which a party may be capriciously deprived of his property or its use without compensation, whether such property consists of franchises or tangible forms of property."
>
> *Lake View* vs. *Rose Hill Cem. Co.*, 70 Ill., 191.

> "It is not within the power of the General Assembly, under the pretence of exercising the police power of the State, to enact laws, not necessary to the preservation of the health and safety of the community, that will be oppressive and burdensome to the citizen. If it should prohibit that which is harmless in itself, or command that to be done which does not tend to promote the health, safety, or welfare of society, it would be an unauthorized exercise of power, and it would be the duty of the Courts to declare such legislation void."
>
> *I. W. & W. R. W. Co.* vs. *City of Jacksonville*, 67 Ill., 37.

> " The Constitutional guaranty of life, liberty and the pursuit of happiness is not limited by the temporary caprice of a present majority and can be limited only by the absolute necessities of the public."
>
> BREWER, *J.*, *Intoxicating Liq. Cases*, 25 Kans., 765, *vid.* also, *Tenement House Cigar Case*, 98 N. Y., 98.
> *Cooley Const. Lim.* (5th ed.), pp. 110 and 445-446.

See also *People* vs. *Marx*, 99 N. Y., 377, 386, where it is said that—

> " No proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, *not injurious to the community*, as he may see fit."

In the light of these authorities, then, we respectfully insist that the prohibitory statute of Kansas, so far as it goes beyond everything that can fairly tend to protect the morals and the habits of the people of Kansas, and absolutely prohibits the appellees from *manufacturing* beer at their brewery for sale in other States and countries, and especially so far as it enacts their buildings and machinery to be a common nuisance, and condemns it to *confiscation and destruction*, exceeds the bounds of any proper exercise of the police power, and has gone beyond the utmost verge of constitutional power, and to that extent, at least, deprives the appellees of their property without " due process of law," and abridges their rightful privileges and immunities as citizens.

It will not be pretended that the mere existence of the brewery in operation, or the mere existence of beer therein in the vats or in the original packages, not intended for sale or consumption *in the State*, is in any way detrimental to the safety, the health, or the morals of the people of Kansas, or tends in the remotest degree in that direction; or that its destination to the *other markets* of

the country, or the world, is not entirely consistent with the complete and perfect prevention of its sale and consumption *within the State.*

The 13th section makes the adjudging of the building and machinery to be a common nuisance and its confiscation and destruction to depend solely upon the *manufacture* of beer taking place in the building, *without the least regard to what is to be done with it, or whether it is to be sold, consumed, or used within the State.* Surely this is utterly unnecessary to the full accomplishment of the police purpose of *preventing its consumption in Kansas.* The experience of other States and other laws, which had no such feature, demonstrates that the other provisions of the act suffice for this purpose. And these novel, additional and extraordinary provisions are but an exercise of arbitrary caprice on the part of the Legislature, not tending, in the nature of things, to promote the health, safety or welfare of the people of the State. The power of the State is entirely adequate to prevent the sale and consumption of beer within the State without prohibiting its *manufacture for export*, and exposing the buildings and machinery used for such manufacture as a prey to the spoiler, by enacting them to be common nuisances and ordering their *destruction.*

There is nothing in the conduct of the business of brewing, or in the mere presence of beer in vats, or in the original packages in the brewery not destined or intended for sale or consumption *within the State* which is in the least akin to the "unwholesome trades, slaughter-houses, operations offensive to the senses, the deposits of gunpowder, the application of steam power to propel cars, or the burial of the dead," cited by Chancellor Kent in the passage so often referred to. The use of his property by the brewer for such purposes does not injure or tend to injure his neighbors. It cannot be in its nature a nuisance and the declaration of the Legislature cannot convert it into one, though it does order its destruction as such. If it can, it may do the same with tea or coffee, or wheat or sugar, or tobacco, the consumption of all of which articles is by many persons regarded as pernicious to health or to morals.

See authorities cited under our First Point.

The scanty majority of the voters of Kansas who established the Constitutional amendment of that State under which this statute was passed, may be permitted to prevent the consumption of beer by the inhabitants of that State, but they cannot make *its manufacture* there for the rest of mankind *a nuisance*, contrary to the very nature of things. The common judgment of enlightened States and Nations, which have from time immemorial encouraged its manufacture and use, is well expressed by the statute of Massachusetts, passed in June, 1789, which we quote:

> "An Act to *encourage the manufacture and consumption of strong beer*, ale and other malt liquors.
>
> "Whereas, the manufacture of strong beer, ale and other malt liquors, *will promote the purposes of husbandry and commerce* by encouraging the growth of such materials as are peculiarly congenial to our soil and climate, and by procuring a valuable article of exportation. *And whereas, the wholesome qualities of malt liquors greatly recommend them to general use as an important means of preserving the health of the citizens of this Commonwealth, and of preventing the pernicious effects of spirituous liquors.*
>
> "1. Be it therefore enacted by the Senate and House of Representatives in General Court Assembled, and by the authority of the same, that all brewhouses wherein shall be made and produced for sale annually a quantity of strong beer or ale not less than one hundred barrels of thirty-one and a half gallons each, beer measure, with the utensils employed in such brewhouses, and the immediate dependencies thereof; also all moneys and stock of every kind employed and improved in such brewhouses, with the strong beer, ale and other malt liquors which shall be there made and produced for sale as aforesaid, with the faculty or annual profit of such manufacture, shall be and they hereby are *exempted from all taxes and duties of every kind* for the term of five years after the passing of this act."

Neither can it be said that there is anything immoral in the business of brewing or in beer itself, as in gambling or lotteries, and the case of *Stone* vs. *Mississippi*, 110 U. S., 814, where this Court held that a constitutional amend-

ment prohibiting gambling and lotteries was not a violation of the *contract clause* of the Constitution, as against a company that had been previously chartered by the State to carry on lotteries, is not applicable to the present case.

There can be no doubt that the absolute prohibition by statute of the use of the appellee's brewery, which was owned by them before the enactment, does in the sense of the law actually deprive them of their property as completely as if the fee in nine-tenths of it were destroyed and blotted out of existence by the same enactment. The proofs show this, and it is practically conceded by the brief on the part of the State. It destroys fifty-five thousand dollars out of their sixty thousand of property.

This can hardly be an open question in this Court since its decision in the case of *Pumpelly* vs. *Green Bay Company*, 13 Wall., 177, where the question of what amounts to "depriving a person of property" was plumply decided:

> "It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual against the Government, and which has received the commendation of jurists, statesmen and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the Government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, and can, in effect, subject it to *total destruction*, without making any compensation, because, in the narrowest sense of the word, it is not taken for the public use.
>
> "Such a construction would pervert the constitutional provision into a restriction on the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private rights under the pretext of the public good which had no warrant in the laws or practices of our ancestors."

And so in that case, it was held that the flooding of the plaintiff's lands by a dam erected by the defendant company, was in effect and in law, a *taking* of his property. And though there may be a great difference between "taking property" without compensation, and "depriving a person of his property without due process of law," in many points of view there can be no doubt that "taking a man's property" is "depriving him of it," and that the same language must have been used by the Court and the same result reached if it had been applying the constitutional provision against the latter wrong as it did use in applying that provision against the former.

Nor has there ever been any negation by this Court of Mr. Justice FIELD'S statement in *Munn* vs. *Illinois*, 94 U. S., 141, that—

> "All that is beneficial in property arises from its use and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in its title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use and the fruits of that use, it does not merit the encomiums it has received."

The following language of the same learned Justice in the same case is also pertinent:

> "Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity, the power of the State over the property of the citizen does not extend beyond such limits."

And—

> "If, for instance, the owner is prohibited from using his property for the purpose for which it was designed, it is of little consequence that he is permitted to retain the title and possession."

Assuming, therefore, as a settled proposition, that by the extraordinary provisions of this statute the appellees are

"deprived of their property" within the meaning of the Fourteenth Amendment, and that this result is worked by the very provisions which go beyond the fair, reasonable, and necessary exercise of the police power, viz., the *absolute prohibition of the use of the brewery for the manufacture of beer for export*, which could by no possibility affect the health, morals, or safety of the people of the State, enacting the brewery to be a nuisance, and ordering its destruction, we submit that so far as the appellees are deprived of their property by this *excess* of action on the part of the Legislature, they are deprived of it "without due process of law," because it is only up to the limit of the police power that a statute imposing such restrictions upon business and property, is, in its nature, "due process of law."

Other statutes which have heretofore come before this Court for consideration and approval were satisfied to make the *sale and traffic* a crime and to provide for its punishment; to prohibit the manufacture or possession for the purpose of sale within the State and to confiscate and destroy the liquor itself and the vessels in which it was contained—provisions which the general experience of legislation has found sufficient for the protection of the people of the State from even the temptation to use the prohibited articles—and so far the police power has heretofore been invoked to sustain them. But there is an immense difference, not in degree only, but in kind, between such enactments, *which leave the brewer the substantial use of his existing brewery for manufacture for export*, and the statute now under consideration, which for no purpose legitimately connected with the protection of the people of the State from the evils of intoxication, proceeds further and annihilates the property of the brewer for all purposes.

It is a fundamental principle, that where there exists the right and power to abate a nuisance, the abatement must be limited by its necessity, and no wanton or unnecessary injury to the property or rights of individuals must be committed.

If, for instance, the nuisance consists in any particular

use to which a building is put, the remedy is to stop such use, not to tear down or destroy the structure itself.

Babcock v. *City of Buffalo*, 56 N. Y., 268; affirming 1 Sheldon, 317.

Chenango Bridge Co. v. *Paige*. 83 N. Y., at pp. 188–190.

Wood on Nuisances, § 738.

That principle finds a precise application here. The only nuisance in this case, sought to be abated, is the *sale* of beer *within the State*. That is the only thing which is in any sense injurious to public health or morals. No argument is needed to demonstrate that fact. It is therefore *that alone* which the Legislature can authorize to be abated as a nuisance and destroyed as property. To this extent the Legislature has therefore clearly overstepped Constitutional limitations.

See also Cases cited under our First Point.

The only answer attempted in the brief on the part of the State to this argument consists in the claim that because the State by its officers in the present case *has not* taken proceedings to the full extent *permitted* by the law, but have been disposed by non-action to leave the appellees still at liberty to manufacture for export, they cannot invoke the Constitutional provision against the proceeding as taken.

> "If," they say (Appellant's Brief, p. 5), "the property used by the defendants is of undiminished value if used for the purpose of manufacturing for barter, sale and gift in other parts of the sovereignty of the United States, and if *by these proceedings* the defendants are not restricted in the use and enjoyment of these premises for such purposes, then they are not deprived of their property or of the use of it, or of any value within the guarantee of the Fourteenth Amendment.
>
> "That they are restrained from selling and manufacturing for sale in a very small portion of the United States—a restraint which although it cuts them off from the neighboring markets leaves them free for all other portions of the United States, and which does not diminish the value of the property

referred to when used for such purpose of manufacturing for sale in other States, surely does not infringe upon the guarantee of the Fourteenth Amendment."

Now, this seems to be a concession of the whole question, for the constitutionality of the law as affected by the Fourteenth Amendment cannot depend upon the proceedings which the law officers of the State may see fit to institute, but upon what the act itself authorizes to be done. And here we have, from their own action and argument, the concession that in the very respect in which this act does go beyond the needful exercise of the police power for the protection of the people of Kansas, viz., by prohibiting the use of the brewery within the State for sale or barter without the State, it does work the destruction of their property, and is a violation of the guarantees of the Fourteenth Amendment.

It is manifest, from their first step in the proceeding in the State Court to this final argument here presented, that the law officers of the State did not intend or venture to test the question of the validity of the act in its most obnoxious provisions. They meant to maintain it as a law simply prohibiting the manufacture for the purpose of sale, barter or gift *within the State*. But the act itself contains no such limitations. Its prohibitions are absolute and universal.

If, then, we have established that the act, so far as it exceeds the legitimate and necessary exercise of the police power, by prohibiting the use of the defendants' brewery for the manufacture of beer to be sold without the State, is unconstitutional, because it deprives the appellees of their previously-acquired property without due process of law, it must follow that the entire prohibitions of the act, as against manufacture, are invalid because it makes no distinction between the prohibition which it is within the power of the State to impose and that which is in excess of its lawful authority. The courts cannot be left to determine in each case whether the implicated brewer or brewery is within the intent of the act, or make guilt or innocence depend upon an intent on which the act does

not itself make it dependent, viz., the intent to sell the beer within or without the State.

The case is not one where the part of the statute as to manufacture which is constitutional can operate independently of that part which is unconstitutional. But a vital part of the prohibition of the act being unconstitutional, and the act itself affording no means of discriminating them from the rest, the whole must fall together.

A portion of the decision of the Court of Appeals of New York, in *Wynehamer* vs. *The People*, 13 N. Y. (3 Kern.), 378, which has never, we believe, been called in question, affords an apt illustration of the rule here invoked.

In that case the Court found the Prohibitory Act of New York to be unconstitutional so far as it made the possession and ownership of liquor existing at the time of the passage of the act a crime, and required its destruction, because it deprived the owners of such liquor and of their property without "due process of law," and when the attempt was made by the law officers of the State to save the rest of the act, because it was conceded that upon property coming into existence after its passage, its provisions would have no such effect, but would by themselves have been perfectly constitutional, the Court refused so to hold, because the act itself furnished no discriminations but involved all such property alike, whether pre-existing or afterwards acquired, in one common and indiscriminate condemnation and destruction.

Judge A. S. JOHNSON, afterwards, for many years, the learned Circuit Judge of the Second Circuit, said (p. 440):

> "The conclusion to which I am thus brought, is necessarily subversive of the first four sections of the law in their present form. For although, when only part of an act is unconstitutional, and that part is entirely separate from the remaining portion, the Court will limit its condemnation to the part which conflicts with the constitution; yet this cannot be done where, as in this case, in a single section several act in relation to the same subject matter and connected in one sentence are forbidden, and in another section all these acts are indiscriminately

declared to be crimes, and one common penalty is annexed to each.

"It may be said, that although the Legislature has not the power to annihilate existing rights of property in any article, it may, nevertheless, make it unlawful to acquire such rights in future; and may, therefore, enact that all rights of property in a particular article thereafter acquired shall be null, and that the article itself shall be destroyed; and hence, that the present law may be enforced as to all rights not shown to have existed when the law took effect.

"But conceding the power of the Legislature to make such a law, it cannot support the present act which operates indiscriminately upon all rights of property in the article in question, without regard to the time when they were acquired. To hold the law valid and operative as to property acquired after it took effect, and void as to rights previously existing would tend to the constant recurrence of the question before the courts as to its constitutionality and to repeated judgments of condemnation of the law.

"Thus the Courts would be required over and over again to declare the same legislative provisions, both valid and void as applicable to different classes of cases. This has been in some instances, but with doubtful propriety, tolerated in purely civil cases, but never, I believe, in respect to penal and criminal legislation. It is not only liable to the objection already suggested of calling into repeated action the ultimate judicial power of passing upon the validity of the acts of a coordinate branch of the Government, but it would tend directly to encourage experimental legislation. If the Legislature may, in a single provision, encroach *ad libitum* upon the Constitution, without other effect than to call upon the Courts to limit its operation to cases within the purview of legislative power nearly all motive for a careful regard for constitutional rights in legislation would be removed and an onerous burden imposed upon the Courts. The general rule on the subject is, that where part of a law is in conflict with the Constitution, and that part is entirely separable from the residue so that other portions of the law can be enforced without reference to it, there the unconstitutional part only will be condemned. But where the legislative provision is indivisible and

> the necessary discrimination has, as in this case, to be made at the trial so that the rights invaded can only be protected by repeated judgments against the validity of the law, although there may be a class of cases to which it might properly apply, the provision is wholly void. The law therefore must be revised and the proper discrimination made before it can be enforced."

DENIO, C. J., also said (p. 459):

> " Although it is in my opinion competent for the Legislature to pass an act contained in the provisions embraced in this Statute to operate only upon intoxicating liquors *hereafter* to be acquired or manufactured, the act referred to *does not discriminate between existing property and that which may hereafter be acquired* or created, but operates equally upon all such property without any respect to the distinction referred to. It does not recognize any defence based upon that distinction, and the Courts cannot entertain any such defence without holding the statute in question unconstitutional in its most material and practical operation. I am therefore of opinion that the act cannot be sustained in regard to existing or future property."

And abundant support in precedent and authority for thus dealing with statutes in which a vital unconstitutional defect is implicitly involved with provisions, which, by themselves, without it might be valid, can readily be cited.

We confidently submit, therefore, that, as the prohibition contained in this Statute of Kansas against manufacturing beer within the State for sale or barter without it is indiscriminately involved in the several prohibitions against its manufacture at all, the Court cannot make the discrimination which the Legislature might have made, and as the former provision amounts to depriving the appellees of their property without due process of law, all the provisions of the act prohibiting manufacture must be involved in a common condemnation.

Third Point.

But if the power and authority of the State Legislature to prohibit the manufacture of beer, whether for sale outside of the State, or within it shall be held to be absolute and unlimited, then we submit, upon the doctrines maintained by the Court of Appeals of New York in the case of Wynehamer, 13 N. Y. (3, Kern.), 378, and by the Circuit Judge below, that in its application to the appellees' brewery, owned, possessed and used by them when the act took effect, the statute of Kansas violates the Fourteenth Amendment, because it deprives them of their property "without due process of law."

(a.) Assuming the act to be an absolute prohibition of brewing, and upholding it as such at the moment of its passage, it did deprive the appellees of their property by destroying the only use for which it was designed, and of which it was capable, which was as complete a deprivation as if the fee itself had been forfeited to the State. By the immediate operation of the statute, without any act committed by the appellees in violation of its provisions, the legal existence which the law and the Constitution designate as property is destroyed, and the private injury is as completely effected as if the thing itself were physically taken away.

When this law was passed the brewery, and its use for the only purpose of which it was susceptible, was property in the most absolute and unqualified sense of the term, and as such as much entitled to the protection of the Constitution as lands, houses, or chattels of any description. The Constitution makes no discrimination between different kinds of property, and if protected by the Constitution from such legislation as we are now considering, it is protected because it is property innocently acquired under existing laws, and not upon any theory of its comparative utility.

If the good of the community requires the owner to be deprived of it for any purpose of public benefit, no matter what, common justice requires that compensation should

be made for it, and any statute which does directly take it away from the owner for the uses of the public without compensation, deprives him of it without due process of law.

What Sir WILLIAM BLACKSTONE wrote a century ago is certainly as applicable now to property which exists under the protection of this constitutional provision as it was then to property in England, which had no such shield against legislative encroachment (1 Bl. Com., 139):

> "So great is the regard of the law for private property that it will not authorize the least violation of it; no, *not even for the general good of the whole community*. In vain may it be urged that the good of the individual ought to yield to that of the community, for it would be dangerous to allow any private man or even any public tribunal to be the judge of this common good and to decide whether it be expedient or not. Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights as modeled by the municipal law. The Legislature alone can and frequently does interfere and compel the individual to acquiesce. But how does it interpose and compel? *Not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnity and equivalent for the injury thereby sustained.*"

Such being the sanctity of private property, the question then is whether the prohibition pronounced directly by the act itself, and not as an indirect and consequential result of its enforcement, is valid. But does the act itself, assuming it to be valid and faithfully obeyed and executed, directly work the essential loss or destruction of the brewery, at which it is aimed. If it does, as it does not, pretend to award compensation, it cannot be "due process of law."

Now it is the use of the brewery which imparts to it, as the proofs show, more than nine-tenths of its actual or possible value. And a scheme of legislation which, aiming directly at the destruction of this use, makes the operation of it for any and every purpose a criminal offense, which declares it, if used at all, a public nuisance, which

subjects its to seizure and physical destruction, must be deemed in every beneficial sense to deprive the owner of the enjoyment of his property.

And such is the actual scheme and operation of this act. It does practically say to the brewer: "Shut up your brewery at once and forever;" and this, notwithstanding the specious suggestions contained in the opinion of Mr. Justice VALENTINE in the State Court (State's Brief, p. 22).

> "We do not wish," he says, "to be understood as saying that our present liquor law or any liquor law which we have ever had in Kansas is or has been an absolute or unqualified prohibitory liquor law. They have none of them been more than limited and qualified prohibition laws. Under the old law the defendant, with a license, could sell his beer to any person and to allpersons with the exception heretofore mentioned; but under the present law we suppose he is subject to at least one other restriction in his sales as to persons. He cannot now sell his beer for medical purposes except to druggists. It would seem, however, that with a permit he may now sell his beer for scientific and mechanical purposes to any and every person who might wish to purchase the same. And therefore it would seem that in this respect no additional restrictions over the old law are imposed."

Considering that, under the old law referred to, the *manufacture* of beer was absolutely unrestricted, and that its freedom of sale by the manufacturer within or without the State was practically so, that there is no such thing in nature as the use of beer for mechanical or for scientific purposes, and that although the present law pretends to allow its sale under almost impossible restriction for medical purposes, yet, as it is made a crime for a physician, under the guise of a prescription, to aid and abet its use as a beverage, and as, if prescribed, it can only be as such beverage, and not as a drug or medicine, this language of the State judge in support of this enactment is certainly not characterized by that fair and ingenuous spirit which generally marks the judicial mind.

For all the purposes of the present argument the act should be construed as if it read: "To enable the State to

administer and enforce its other laws against the use of intoxicating liquors, every brewery in the State from and after the date when this act takes effect shall be at once and forever closed." From the moment the act took effect the brewery of the appellees could not be kept open for a single instant with a view to its use for any purpose except the practically impossible one of a brewing for medical, scientific or mechanical purposes. *De minimis non curat lex.* The infinitesimal exception establishes the sweeping universality of the prohibition of the act.

The effect of the statute attempted in New York on manufactured liquor existing at the time of its passage, all right of sale or use of which was taken away, although the title and possession was left with and in the owner, was demonstrated by Judge COMSTOCK in his opinion to be depriving the owner of his property "without due process of law," and no successful answer has ever been made, nor can any as we believe be made to his argument; and we shall not apologize for appropriating his language and the authorities cited by him to the present case so far as applicable.

His definition of "due process of law" as used in the Constitution, and as applicable to such cases has never been surpassed, 13 N. Y. (3 Kern.), p. 392:

> "No doubt, it seems to me, can be admitted of the meaning of these provisions. To say, as has been suggested, that 'the law of the land,' or 'due process of law,' may mean the very act of legislation, which deprives the citizen of his rights, privileges or property, leads to a simple absurdity. The Constitution would then mean that no person shall be deprived of his property or right, unless the Legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away. The true interpretation of these constitutional phrases is that where rights are acquired by the citizen under the existing law there is no power in any branch of the government to take them away, but where they are held contrary to the existing law, or are forfeited by its violation then they may be taken from him, not by an act of the Legislature, but in the due administration of the law itself, before the judicial tribunals

of the State. The cause or occcasion of depriving the citizen of his supposed rights must be found in the law as it is, or, at least, it cannot be created by a legisltive act which aims at their destruction. *Where rights of property are admitted to exist, the Legislature cannot say that they shall exist no longer*, nor will it make any difference although a process and a tribunal are appointed to execute the sentence. If this is 'law of the land,' and 'due process of law' within the meaning of the Constitution, then the Legislature is omnipotent. It may under the same interpretation pass a law to take away liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed by the Constitution in the same category with liberty and life."

And the definitions of the same phrases which he cites from the most renowned jurists concur in his view.

Norman vs. *Heiss*, 5 Watts. & Serg., 193, Ch. J. GIBSON:

"What law? [referring to the phrase 'law of the land'] Undoubtedly a pre existing rule of conduct, not an *ex post facto* rescript or decree made for the occasion. The design of the Constitution was to exclude arbitrary power from any branch of the government; and there would be no exclusion of it, if such rescripts or decrees were to take effect, in the form of a statute. The right of property has no foundation or security but the law; and when the Legislature shall successfully attempt to overturn it, even in a single instance, the liberty of the citizen is no more."

Ch. J. BRONSON, *Taylor* vs. *Porter*, 4 Hill, 145:

"The words 'law of the land,' do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory and turn this part of the Constitution into mere nonsense."

"The meaning of the section seems to be that no member of the State shall be disfranchised of his rights and privileges unless the matter be adjudged

against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges or that some one else has a superior title to the property he possesses before either of them can be taken from him. It cannot be done by mere legislation."

Chief Justice RUFFIN, *Hoke* vs. *Henderson*, 4 Dev., 15, declares that the terms:

> "'Law of the land' do not mean merely an act of the general assembly. If they did every restriction upon the legislative authority would be at once abrogated. In reference to the inflicting of punishment and diversity of the rights of property it has been repeatedly held in this State, and it is believed in every State of the Union, that there are limitations upon the legislative power, notwithstanding these words; and that the clause itself means that such legislative acts as profess, in themselves directly to punish persons or to deprive the citizen of his property without trial before the judicial tribunals, and a decision upon the matter of right as determined by the laws under which it vested, according to the course, mode and usages of the common law, as derived from our forefathers, are not effectually 'laws of the land' for those purposes."

Chancellor KENT, 2 Com., 13.

> "The words 'law of the land' as used originally in *Magna Charta*, in reference to this subject, are understood to mean 'due process of law,' that is by indictment or presentment of good and lawful men," 'and this,' says Lord Coke, 'is the true sense and exposition of those words.' The better and larger definition of 'due process of law' is that it means law in its regular course of administration through courts of justice."

These are truly old-fashioned views and notions of the law, but the strength of constitutional principles is that they do not change with the varying whims and caprices of the fickle majority.

Tested by these authoritative definitions the statute of Kansas, as it operates upon the appellees' brewery with-

out awaiting any act or violation of law on their part, cannot itself be set up as "due process of law." By the mere operation of the law itself, without anything more, the actual and commercial value of the property is annihilated. It cannot be *used;* it is made unlawful to use it; for a single moment's use attempted after the act takes effect all legal protection is withdrawn from it; it becomes a public nuisance and is doomed to actual destruction.

According to the doctrine so emphatically laid down by this entire Court in the *Pumpelly* case, and repeated in substance by Mr. Justice FIELD in the case of *Munn* v. *Illinois*—all that is beneficial in property is the use and enjoyment of it; the use is the property, and if that is taken away, it matters not that the empty husks of title and possession are left with him who was once the owner.

> "The third absolute right of every Englishman is that of property, which consists in the *free use, enjoyment* and disposal of all his acquisitions without any control or diminution, save only by the laws of the land" (1 Black's Com., 138).
>
> "*The exclusive right of using* and transferring property follows as a natural consequence from the perception and admission of the right itself." 2 Kent's Com., 320.

And this is common sense.

The statute of New York, as to liquors, in existence, when it took effect did not take away or disturb the title or the possession of the owner; it simply annihilated the quality of *sale* which made it beneficial or valuable to the owner, and so, was destructive of the idea of property in it; and exactly so, this act of Kansas, while it does leave the title and possession of the brewery in the owner, annihilates its use, which alone made it beneficial or valuable, and so is destructive of the idea of property in it. The two cases are substantially alike; the decision in the New York case is a direct authority in support of the decree below, and Judge COMSTOCK's closing language (3 Kern., 398), is exactly applicable here:

> "The provisions of the Constitution should receive a beneficent and liberal interpretation where

> the fundamental rights of the citizen are concerned. But in the case before us, its plain and obvious meaning is enough. 'No person can be deprived of his property without due process of law,' by the Legislature or any other power of the Government. When a law *annihilates the value of property and strips it of its attributes by which alone it is distinguished as property, the owner is deprived of it*, according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power."

To say that a law passed in the exercise of the police power is "due process of law," within the meaning of this clause, and therefore competent of itself to deprive the citizen of his property without reason, is, in the light of the definition above quoted, in the last degree defiant of established principles. It is doubtless true that in frequent cases of the exercise of that power by constitutional legislation the indirect and consequential injuries suffered by individuals cannot be permitted to stand in the way of its execution, or be presented as arguments for its invalidity. But this is not such a case. Here the appellees were directly, by the immediate effect and operation of the statute, deprived of their property, and no authority, we think, can be cited in support of the claim of an authority in the Legislature to act directly and not consequentially upon property to the prejudice of the owner—to destroy property, and so deprive the owner of it, where the property itself was not a source of danger or infection, physical or moral, to those in its neighborhood. It will not be pretended that the Legislature of Kansas, as part of a law establishing the police system of the State, could deprive the appellees of their brewery, by taking it for a police station or a police court, or enact its destruction because it marred the neighborhood of a public park or a parade ground, by a mere enactment for that purpose. That would not be "due process of law."

See cases cited under First Point.

Something more than the mere enactment of taking or destruction is surely necessary to make such a statute

"due process of law," and that is, adequate provision for compensation to the owner for property so destroyed or taken. No one, we think, would claim that a statute, purporting to exercise the power of eminent domain, would be "due process of law," by which a citizen, against that clause of the Constitution, could be deprived of his property, if such statute omitted all provisions for compensation.

We submit that it is a sound and impregnable proposition, that where a citizen is attempted to be deprived of his property by legislative enactment, for purposes and under circumstances where, by the principles of common justice and the settled principles of English law, he ought to receive compensation and no such compensation is awarded by the act, the statute is not "due process of law," and is in direct and necessary conflict with the constitutional clause, which forbids the depriving of any person of life, liberty or property without it.

It is not necessary that there should be in the Constitution the more modern clause, which forbids the taking of private property for public use without compensation, to enable the party aggrieved by the statute to invoke the protection of the Courts. The protection afforded to him by the "due process of law" clause is abundantly ample.

Sinnickson v. *Johnson*, 2 Harrison, N.J., 129.
Gardner v. *Newbury*, 2 Johns. Chan., 162.

The right to compensation, according to the principles of common justice and the settled principles of English law, does not depend upon a person's property being taken over by the State, so as to become the property of the State, or of some corporation or organization to which it has delegated the right of eminent domain; it is enough that, for the sake of the public, in the public interest, to promote any public improvement, the property of the citizen, or the use and enjoyment of it, in which its whole value consists, is, by the statute, directly and not consequentially taken away.

Pumpelly v. *Green Bay Co.*, 13 Wall., 166.

And thus we come directly to the very proposition so ably and elaborately presented in the opinion of Circuit

Judge BREWER in the *Wallruff case*, to which no answer whatever has been attempted in the brief on the part of the State. The reasons and arguments of that learned Judge, in support of the point we have attempted to present, are there stated with such cogent and convincing force, that justice cannot be done to the case without a complete repetition of it, and we therefore set it forth in full.

STATE EX REL.,

VS.

JOHN WALRUFF ET AL.

The facts upon which the foundation question in this case rests are few and simple. Between 1870 and 1874 the defendants constructed a brewery in Lawrence, Kansas. The building, machinery and fixtures were designed and adapted for the making of beer, and nothing else. For such purpose they are worth $50,000; for any other purpose not to exceed $5,000. At the time of the erection of the building, and up to 1880, the making of beer was as legal, as free from tax, license, or other restriction as the milling of flour. In that year a constitutional amendment was adopted prohibiting the manufacture of beer except for medicinal, scientific and mechanical purposes. In 1881 and 1885 laws were enacted to carry this prohibition into effect. Under these laws a permit was essential for the manufacture for the excepted purposes. To the defendants this permit was refused. An injunction was thereupon sued out from the District Court enjoining defendants absolutely from the manufacture of beer. Thus, in strict conformity to the laws of the State, the defendants are prohibited from using their property for the purposes for which alone it is designed, adapted and valuable, and are required without compensation, to surrender $45,000 of value which they had acquired under every solemn unlimited guarantee of protection to property which constitutional declaration and the underlying thought of just and staple government could give.

The action in which this injunction was granted they now seek to remove to this Court, and insist that no matter what the State may think or do the Fourteenth Amendment to the Federal Constitution does give protection, or at least that they are entitled to the opinion and judgment of the Federal Courts upon the question whether that portion of the Fourteenth Amendment which forbids a State to 'deprive any person of life, liberty or property without due process of law,' and 'to deny to any person within its jurisdiction the equal protection of the laws,' is not violated by this action of the State as respects them.

It is idle to deny that the question here presented is one of difficulty and grave importance. On the one hand it is insisted that both the amendment and the laws were duly in compliance with established forms of procedure adopted and enacted; that the withholding of the permit was the act of a judicial officer in the exercise of a proper and granted discretion; that the injunction was issued out of the regular Court of general original jurisdiction, and in an ordinary and familiar form of action; that thus there has been 'due process of law,' and that the amendment does not prohibit a State from depriving a person of his property, but only prohibits such deprivation 'without due process of law,' while on the other hand it is apparent that the defendants having invested large properties in a perfectly legal business, are stripped of the value of such properties, and that not as the indirect and consequential result of legislative changes in the law, but by a direct prohibition upon the only use for which such properties are designated, adapted and valuable. Is a State potent through the forms of law to take from a citizen by direct action the value of his property without compensation?

As the judge of an inferior Federal Court, I turn naturally to the opinions of my superior the Supreme Court of the United States for information and guidance. In the case of Bartemyer *vs.* Iowa, 18 Wall., 129, the opinion of the Court was delivered by Justice Miller, and in it the Court uses this language: 'But if it were true, and it were fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then

we can see that two very grave questions would arise, namely: Whether this would be a statute depriving him of his property without due process of law; and secondly, whether if it were so, it would be so far a violation of the Fourteenth Amendment in that regard, as would call for judicial action by this Court.' In the same case, in a concurring opinion, Justice Bradley said: 'The law, therefore, was not an invasion of property existing at the date of its passage, and the question of depriving a person of property without due process of law, does not arise. No one has ever doubted that a Legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with vested rights of property. When such rights stand in the way of the public good, they can be removed by awarding compensation to the owner.' And Justice Field adds these words: 'I have no doubt of the power of the State to regulate the sale of intoxicating liquors, when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such articles as well as to use and enjoy it. Any act which declares that the owner shall neither sell it, nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any State, the Fourteenth Amendment affords protection.' In the subsequent case of the Beer Company *vs.* Massachusetts, 97 U. S., 25, the Court thus refers to this matter: 'If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance by an incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without compensation, but *we infer that the liquor in this case, as in the case of Bartemyer* vs. *Iowa, was not in existence when the liquor law of Massachusetts was passed.*'

In the light of this declaration of the Supreme Court, that when a man owns, with the unrestricted right to use or sell a glass of liquor, mere personal property which without injury or depreciation in

value can be carried outside the jurisdiction of the State, legislation of a State prohibiting its sale, and to that extent only diminishing its value, presents a grave question under the Fourteenth Amendment; the further positive assertion of one of the justices that such legislation is void under that amendment, and a still further intimation of the Court in a later case that vested rights of property cannot be destroyed for the public good without compensation, it would seem a contemptuous disregard by a subordinate tribunal of the judgment of its superior for me to hold that legislation of a State destroying the value by prohibiting the use of property which cannot be moved and in whose use the owner had prior thereto an absolute and unrestricted title, is clearly not in conflict with that amendment, and presents absolutely no question for the cognizance and judgment of the federal tribunals.

But I am not content to leave this case upon these authoritative suggestions of the Supreme Court. As a new matter it is clear to me that there is a federal question giving right of removal; and here I assert these propositions: First, debarring a man by express prohibition from the use of his property for the sake of the public, is a taking of private property for public uses. It is the power to use and not the mere title which gives value to property. Give a man the fee simple title to a flour mill coupled with an absolute prohibition on its use, and of what value is it to him? In the most common and ordinary cases of taking private property for public uses, the condemnation of the right of way for a railroad, the title is not divested. The owner still retains the fee simple and is only debarred from the use. When the railroad abandons the use he retakes it. In the leading case of Pumpelly *vs.* Green Bay Co., 13 Wall, 166, which was a case where land was overflowed in consequence of the erection of a dam, the Supreme Court thus disposes of the matter: 'It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Govern-

ment refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the Government, and make it an authority for invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.'

In the case of Munn *vs.* Illinois, 94 U. S., 141, Justice Field uses this language: 'All that is beneficial in property arises from its use; and whatever deprives a person of them, deprives him of all that is desirable or valuable in the title and possession. If the constitutional guarantee extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received.'

I meet here the common argument that when private property is taken for public use, there is always a transfer of the use from one party to another; that here the use is not transferred, but only forbidden, and that this deprivation of the use is only one of the consequential injuries resulting from a change of policy on the part of the State, for which no compensation or redress is allowed. It is *damnum absque injuria*. The argument is not sound. As a matter of fact, in condemnation cases, seldom is the particular use to which the property has been put transferred. Almost always that use is destroyed in order that another may be acquired. The farmer surrenders a part of his farm to the railroad company, not that the company may continue its use for farming purposes, but that the public may acquire the benefit in another direction; so where land is flowed by a milldam. And thus it is generally. Here the use is taken away solely and directly for the benefit of the public. For no other reason and upon no other ground, could it be disturbed. Of course, in this as in other cases, some use remains to the owner, but here, as elsewhere, the use which is of special value is taken from him for the benefit of the public. And this is not a con-

sequential result. It is not that the profits of his manufacture are reduced by reason of a prohibition upon sales. The law speaks to him by direct command, and says, stop your manufacturing. It is idle to talk of consequential results and injuries when the law in direct language forbids the use of the premises for a brewery.

I assert, secondly, that natural equity, as well as constitutional guarantee, forbids such a taking of private property for the public good without compensation. In the case of the State *vs.* Mugler, 29 Kas., 252, this question was presented to the Supreme Court of Kansas, and as a member of that Court I then expressed this opinion. I am aware that my brethern differed with me, and that the Court held that the State Constitution carried no such proposition. In view of that decision I shall have little to say in respect to the guarantees of the State Constitution. I may, however, be permitted to say, and I do it with the highest respect for the members of that Court, and with the utmost deference to its opinion and judgments, that in the light of the frequent discussions of the question since that decision, and the more I have reflected thereon, the more profoundly am I convinced that the guarantees of safety and protection to private property contained within our State Constitution, forbid that any man should thus be despoiled of that which gives value to his property for the sake of the public good without first receiving compensation for that which is taken from him.

Turning to the opinions of other courts I find strong endorsement of the proposition I have asserted. In case of Lake View *vs.* Rose Hill Cemetery Company, 70 Ills., 101, the Court says: 'We are unwilling to concede the existence of an indefinable power, superior to the Constitution, that may be invoked whenever the Legislature may deem the public exigency may require it, by which a party may be capriciously deprived of his property or its use, whether such property consists of franchises or tangible forms of property.'

The Constitution of New Jersey contains no such guarantees as ours, yet the Supreme Court of that state, in Sinnickson *vs.* Johnson, 2 Harrison, 129, declares:

'That this power to take private property reaches back of all constitutional provision, and it seems to have been a settled principle of universal law that

the right to compensation is an incident to the exercise of that power, that the one is inseparably connected with the other, that they may be said to exist, not as separate and distinct principles but as parts of one and the same principle.'

The Constitution of New York was similarly deficient, and yet in Gardner *vs.* Newberg, 2 Johns. Ch., 162, Chancellor Kent granted an injunction to prevent the trustees from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the Legislature which authorized it, had made no provision for compensating the plaintiff for the injury thus done to his land. After citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed, must be indemnified. And he adds that the principles and practice of the English government are equally explicit on this point. Were similar action taken by the State in respect to other industries, I can but think the vigor of constitutional guarantees would seem clearer. In my own city is a large manufacturing establishment, in which hundreds of thousands of dollars have been invested for the making of glucose. This is an inferior kind of sugar and in the opinion of some, a deleterious article. But the industry is legal, the manufacture not forbidden. Suppose the next Legislature should believe that glucose was injurious to the public health and forbid its manufacture. Could the wheels of that manufactory be stayed and the value of that investment be destroyed without compensation? Take also the illustration of playing cards, which, by reason of their use for gambling purposes, are, in the judgment of many good people, a bane to society. If a factory for their manufacture was established, when as now a perfectly legal industry, would the owner hold his investment subject to the opinions of perhaps a temporary majority?

Or take a still stronger illustration: This is a corn-growing State. Yet wheat also is raised abundantly, and many flour mills exist. Suppose the Legislature should determine that the best interests of the state would be promoted by stopping the growing of wheat, and increasing the crop of corn; and to that

end should prohibit the milling of flour. Must the owners without compensation abandon their milling and sacrifice their investment? Does not natural justice, as well as constitutional guarantee, compel compensation as a condition to such sacrifice? Yet, who can state what the law will recognize as a legal distinction between those cases and this? Of course, it will be said that no Legislature would ever think of such extreme and unreasonable action. But the question for courts to determine is not what is likely to be done, but what can be done.

Thirdly, I affirm that no matter what legislative enactments may be had, what forms of procedure, judicial or otherwise, may be prescribed, there is not 'due process of law,' if the plain purpose and inevitable result is the spoliation of private property for the benefit of the public without compensation. It is a mistake to say that the forms of law alone constitute 'due process.' No complete and perfect definition of the phrase 'due process of law,' has yet been given. The most familiar, and one for ordinary cases sufficiently accurate, is that given by Daniel Webster in the celebrated Dartmouth College case, the "law of the land" being substantially equivalent to 'due process of law,' as follows: 'By the law of the land is meant the general law, which hears before it condemns, which proceeds upon inquiry and renders judgment only upon trial.'

But as said by Mr. Justice Miller, in Davidson *vs.* New Orleans, 96 U. S., 104, it is probably better 'to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.'

In the same case Mr. Justice Bradley adds these words: 'In judging what is "due process of law," respect of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law," but if found to be arbitrary, oppressive and unjust, it may be declared to be not "due process of law."'

In Murrays' Lessee *vs.* Hoboken L. & I. Co., 18 How., 266, the Supreme Court thus limits the meaning of the phrase:

'The Constitution contains no description of these processes which it was intended to allow or

forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial powers, of the Government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will.'

Now, in the case at bar, while judicial proceedings are prescribed, yet the spoliation is the direct command of the Legislature, and the judicial proceedings are only the machinery to execute that command. No discretion is left to the Courts. The Legislature has in terms said to defendants, stop your use of your brewery, and has directed the Courts to enforce that command. There is nothing but mere machinery between the legislative edict and an unused valueless manufactory. As well might the executive as the Courts be charged with the enforcement of this command. Such a command, no matter how enforced, operative to deprive the citizen of the value of his property without compensation, is, in the language of Mr. Justice Bradley, *supra*, 'arbitrary, oppressive and unjust,' and therefore should be 'declared to be not due process of law.'

Fourthly, and as a necessary consequence of the preceding, legislation which operates upon the defendants, as does this, is in conflict with the Fourteenth Amendment, and as to them void. At least it presents a question arising under such amendment as to which they are entitled to the opinion and judgment of the Federal Courts. As the amount in controversy is unquestionably in excess of five hundred dollars, the case is a removable one. In view of what has hitherto fallen from my pen in other cases, it may be unnecessary to add anything further; yet to guard against any possible misapprehension, as well as to indicate that my views, as expressed upon other questions, have not changed, let me say that I do not in the least question the power of the State to absolutely prohibit the manufacture of beer, or doubt that such prohibition is potential as against any one proposing in the future to engage in such manufacture. Any one thus engaging does so at his peril, and cannot invoke the protection of the Fourteenth Amendment or demand the consideration and judgment of the Federal Courts

All that I hold is, that property within the meaning of that amendment includes both the title and the right to use; that when the right to use in a given way is vested in a citizen, it cannot be taken from him for the public good without compensation. Beyond any doubt the State can prohibit defendants from continuing their business of brewing, but before it can do so it must pay the value of the property destroyed.

Nothing that I have said in this opinion is to be taken as bearing on the question of the sale of beer or the power of the State over that. Counsel claimed that the right to manufacture without the right to sell was a barren right. Whatever limitations may exist in this state the markets of the world are open, and with such markets the right to manufacture is far from a barren right.

Other questions were discussed by counsel at great length and with great ability. I have not noticed them in this opinion, already quite lengthy, because this question is in the case, cannot be ignored, and justifies a removal.

The motion to remand will be overruled.

One thing more I may be excused for referring to. In the course of the various arguments that have been made to me in this Statf and the sister State of Iowa on the question os removals to the Federal Courts of proceedinge to enforce their prohibitory laws it has more than once been intimated that jurisdiction in the Federal Courts of such proceedings meant the nullification of those laws. There could be no greater mistake. The judges of these courts are citizens of these States; as interested as any citizens in the good name of their States, the enforcement and the sobriety of their citizens, and experience has shown that those courts enforce laws as strictly as any, are as little disposed to tolerate trifling or evasion of their orders, and generally with a severer hand. If it should so happen that by the judgment of the Supreme Court of the United States, the ultimate tribunal in this nation, it should be determined that in this or any kindred case, the zeal for temperance of the good people of this State has led them to infringe upon sacred and protected rights of property I cannot doubt that they will gladly hasten to make the compensation which shall be found just. Indeed it is a truth ever to be borne in mind, and never more so than in times of deep feeling and determined ef-

fort, that they who are striving to lift society up to the plane of a higher and purer life should see to it that every act and every step is attended by absolute justice. I commend this to the thoughtful consideration and judgment of the good people of my State, a State in whose past I glory, and in whose future I beleive.

DAVID J. BREWER,
Circuit Judge.

The only answer that has, to our knowledge, ever been attempted to be made to this masterly statement of the the law by Judge BREWER is contained in the very able but technical opinion of Mr. Justice MARTIN, one of the District Judges of the State, in the present case, which is set forth in full in the brief on the part of the State (pp. 26–37).

But we submit that that learned Judge's criticisms are more specious than sound, and do not at all impair the force of Judge BREWER'S arguments or the weight of his conclusions. Judge MARTIN'S main contention is that it is one thing to take a man's property for public use without compensation, and quite another and different thing to deprive a person of his property without due process of law, and that these two things are so utterly different and unlike that no given case can come indiscriminately within the meaning and protection of both, that while by the Fifth Amendment in the restraints upon Federal legislation in corporated in the Constitution both clauses were introduced indicating the purpose to restrain the Federal Legislature from the two unlike and different things, the framers of the Fourteenth Amendment, in measuring the restraints to be put by its means upon State action, carefully limited it to forbidding the States to deprive any person of life, liberty or property without due process of law, and as carefully omitted to insert the clause forbidding the taking of private property for public use without compensation, thereby indicating a studied purpose not to authorize the Federal Courts to interfere with State statutes which merely infringe upon the latter clause; that every case of statutory spoliation must come within one clause or the other; and no case can possibly come indiscriminately under both or either; and that Judge BREWER

had confused the two things and brought what was really, according to his views, a case of taking private property for public use, without compensation, into the category of depriving persons of property without process of law, and that as the former clause under which the case came was not contained in the Fourteenth Amendment, Judge BREWER had made a mistake in holding that amendment as applicable.

The rest of Judge MARTIN'S opinion is devoted to a discussion of the decisions of this Court, with a view of showing that they had not yet established that a liquor law such as that of Kansas operates upon the owners of breweries either as a taking of private property for public use, or as a deprivation of property without due process of law.

We have not claimed that they have, but have only insisted, and still insist, in spite of all that the Judge has said, that the decisions of this Court leave the question *open for decision*, when it shall be fairly presented.

As Judge MARTIN'S opinion was delivered in support of his refusal to recognize the removal of the cause into the Federal Court a few comments upon it may be permitted.

In citing from the opinion of Mr. Justice MILLER in the *Slaughter House Case*, 16 Wall., 36, this clause—

> "It is sufficient to say, that under no construction of that provision that we have ever seen, or that we deemed admissible, can the restraint imposed upon the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision"—

he omits to notice that the learned Justice had started out in his opinion, as one of its premises, with the broad statement, as matter of fact, that there was no substantial restraint imposed by the act upon the prosecution of their trade by the butchers; that every man could follow his trade as before, only he must conform to the regulations of the new statute as to the place where he should do his slaughtering. Of course, if the butchers were not in fact

deprived of their property at all, it could not be said that they were deprived of it without due process of law, and the case is wide asunder from that at bar, where by the mere operation of the statute itself, without any act done or committed by the brewer, he is deprived of all that is valuable in his brewery, without any process, or chance to be heard.

He then attempts, but without success, to set up a distinction between the *Wynehamer* case in New York, the "*solitary exception*" referred to and recognized by Mr. Justice MILLER in *Bartemeyer* vs. *Iowa*, and the *Wallruff case*, or the case at bar.

> "But the title to such brewery," he says, "is in no manner affected or incumbered by the amendment and the statutes. Neither the real estate nor the personal property is 'taken' by the State for public use. The State obtains no title, no easement, no license, nothing. And the owner is in no wise deprived of his property; he parts with nothing."

But it will be noted, that each successive proposition here stated was equally true of the defendant's liquor on hand at the time of the passage of the act in the *Wynehamer* case.

He describes the prohibition of the Kansas act as "restricting and regulating to *some* extent" the use of the brewery, whereas, it is clear that the prohibition of the use is in fact total unless the Court is willing to regard manufacture of beer for mechanical, scientific and medical purposes as a substantial exception, which the New York Court refused to do, even under their much more liberal statute.

The points suggested by Judge MARTIN in reference to the other decisions of this Court cited by him have already been sufficiently noticed in the course of this brief, except that it may be fair to state that if the learned Judge had more carefully read the opinion of this Court in *Foster* vs. *Kansas* (112 U. S., 201), he would have seen that it required him to recognize the jurisdiction of the Federal Court, and to decide the other way the motion before him as to removal.

All the other decisions of this Court cited by him do but recognize the competency of the police power of the State to restrict, regulate, and even prohibit noxious trades, without touching the question of the rights and remedies of a party situated like the appellees, or the defendant in the *Wynehamer case*, whose property is, by absolute and sweeping prohibitions contained in such statutes, destroyed, and the entire use and value taken from him, and whether he is or not deprived of it without due process of law.

The two passages cited by Judge Martin from the opinion of Mr. Justice FIELD in *Missouri Pacific Railway Company* vs. *Humes*, 115 U. S., 514, do expressly recognize the reservation of the present as an excepted case in the qualifications made by him of the universality of the police power, thus:

> "If the laws enacted by a State be *within the legitimate sphere of legislative power*, and their enforcement be *attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights*, the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law."

And again:

> "It is hardly necessary to say that the hardship, impolicy or injustice of State laws is not necessarily an objection to their constitutional validity, and that the remedy for evils of that character is to be sought from State Legislatures. Our jurisdiction cannot be invoked *unless some right claimed under the Constitution, laws, or treaty of the United States is invaded*. The Court is not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation."

Returning now to Judge MARTIN'S criticisms upon Judge BREWER'S positions, and to his charge that he has, without warrant, confused, blended or combined the two constitutional provisions and principles, we submit that the two provisions or clauses referred to are not so clearly

distinct and different as that no case can come indiscriminately under the protection of both or either; that on the contrary, many cases may come fairly within either the clause that no State shall "deprive any person of life, liberty or property without due process of law," or the kindred clause that the State shall not take private property for public use without compensation, just as a substantial denial of the right of trial by jury, in cases where from time immemorial it has been allowed, may justify a party in invoking the protection of the Federal Courts under the Fourteenth Amendment, although the clause that the trial by jury shall remain forever inviolate is not incorporated within its provisions; that the omission in the Fourteenth Amendment of the clause forbidding the taking of private property for public use without compensation, in contrast with its insertion in the Fifth Amendment, side by side with the "due process of law" clause, is not sufficient to justify this Court in refusing its protection in a case clearly involving a violation of the latter clause, although the same case might fairly have been regarded as within the former clause if that had been inserted in the Amendment; that where a person's property is in any way taken for the public benefit or destroyed in the public interest, or he is deprived of the use and enjoyment of it, which alone gives it its character of property, for a public improvement whether physical or moral by a State statute, in a manner and under circumstances which, according to natural justice and the settled principles of the English law, entitle him to compensation for it, and no such compensation is awarded to him by the statute; he is, within the meaning of the Fourteenth Amendment, deprived of his property without due process of law; that where this taking, destruction or deprivation of property is direct and immediate, enacted directly against the property by the terms of the statute, as in this case and the *Wynehamer Case*, and not remote, indirect and consequential, as in cases which have heretofore been considered by this Court, the party aggrieved has been by the State deprived of his property without due process of law, and is entitled to the protection of this Court.

We confidently submit, therefore, that the prohibitory statute of Kansas, as well in the special methods of forfeiture of property and punishment of person prescribed by the thirteenth section, for the enforcement of which alone this action has been brought by the State, as also in its general scope and tenor, by which the appellees were absolutely prohibited from any further use of their property, is void, as being in violation of the Fourteenth Amendment of the Constitution of the United States, and that the Circuit Court properly so decided and dismissed the bill, and that its decree should therefore be affirmed, with costs.

ROBERT M. EATON,
JOHN C. TOMLINSON,
JOSEPH H. CHOATE,
Of Counsel for Appellees.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 934.

THE STATE OF KANSAS, *ex rel.* J. F. TUFTS, Assistant Attorney General of the State of Kansas, for Atchison County, Kansas, Appellant,

vs.

HERMAN ZIEBOLD AND JOSEPH HAGELIN, Partners as Ziebold and Hagelin, Appellees.

Appeal from the Circuit Court of the United States for the District of Kansas.

G. G. Vest,
For Appellees.

Judd & Detweiler, Printers.

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Appeal from the Circuit Court of the United States for the District of Kansas.

STATEMENT.

This is an action instituted under the provisions of the statute of Kansas, known as the "Prohibition Law," to condemn as a public nuisance, the Brewery of appellees in the county of Atchison.

On August 13th, 1886, a petition in the nature of an information, was filed by the appellant in the district court of

Atchison county, Kansas, to the effect that a certain "group of buildings in Atchison county, Kansas, known as the 'Brewery,'" and owned by Ziebold and Hagelin "is a place where spirituous, vinous, fermented, malt, and other intoxicating liquors are, and have been for several months last past, bartered, sold, and given away, and where intoxicating liquors are kept for barter, sale, and gift, in violation of law, and are manufactured for barter, sale, and gift in the State of Kansas, in violation of law." That the owners of said brewery have "no permit issued according to law by the probate judge of Atchison county, Kansas," authorizing them to barter, sell, give away, or manufacture intoxicating liquors, and that said brewery is a public nuisance. The petition concluded with the prayer that the defendants Ziebold and Hagelin may be enjoined from selling, bartering or giving away, and from manufacturing for barter, sale, or gift in the State of Kansas, any vinous, malt, spirituous, or other intoxicating liquors.

On August 15th, 1886, the defendants answered, denying generally the allegations of the petition, and pleading specially that the buildings and premises mentioned in the petition were erected by the defendants prior to the passage of what is known as the prohibitory law of the State of Kansas, and the constitutional amendment prohibiting the sale and manufacture of intoxicating liquors for other than medicinal, scientific, and mechanical purposes. "That at the time said buildings were erected they were intended for manufacturing beer, and are adapted for no other purpose and can be used for no other purpose; that they are of the value of sixty thousand dollars, and if said defendants shall be prevented from the operation thereof for the purposes for which they

were erected that the same will be wholly lost to the defendants."

On August the 15th, 1886, the defendants, Ziebold and Hagelin filed their petition and bond for the removal of the cause to the circuit court of the United States for the district of Kansas, and in their petition alleged that the law under which the proceeding was instituted was in conflict with the Constitution of the United States, and especially with that portion of section one of article fourteen which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the law."

That notwithstanding said provision of the Constitution of the United States, the Legislature of the State of Kansas, by an act entitled "An act amendatory of and supplemental to chapter one hundred and twenty-eight of the session laws of 1881, being 'An act entitled an act to prohibit the manufacture and sale of intoxicating liquors except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes,'" approved March 7, 1885, provided, by section one of said act, that it shall be unlawful for any person or persons to sell or barter for medical, scientific, or mechanical purposes any malt, vinous, spirituous, fermented, or other intoxicating liquors without first having procured a druggist's permit therefor from the probate judge of the county wherein such druggist may at the time be doing business, &c. That this suit is brought and prosecuted against defendants because,

and only because, it is claimed that defendants had not taken out such druggist's permit authorizing them to sell, barter, or give away, and to manufacture beer.

That it is not alleged or pretended that defendants are or have been engaged in the traffic or sale of intoxicating liquors for other than medical, scientific, and mechanical purposes, but that the place where said defendants are alleged to be engaged in the sale of intoxicating liquors is claimed to be a nuisance because defendants have no permit from the probate judge of Atchison county as provided by the statute of Kansas before mentioned.

The defendants also state that long prior to the passage of said statute, and since the year 1870, the defendants had erected the buildings used by them as a brewery, and had placed therein costly machinery, and that for any other purpose than the manufacture of beer said buildings and machinery are worthless.

That when said buildings were erected, and said machinery placed therein, there was no restriction upon the manufacture of beer under the laws of Kansas, and said buildings and machinery cost the sum of $60,000.

The application of defendants for a transfer of the cause to the United States circuit court was overruled, and the district court of Atchison county then granted a temporary injunction against defendants, restraining them from bartering, selling, or giving away intoxicating liquors upon said premises, or manufacturing beer or other intoxicating liquors for barter, sale, or gift in the State of Kansas.

The defendants Riebold and Hagelin, filed a transcript of the record and proceedings of the district court of Atchison county, in the circuit court of the United States for the dis-

trict of Kansas, with a petition asking for the removal of the cause to that court, setting forth the facts as hereinbefore stated, to which petition the appellant herein filed a plea in abatement, traversing all the allegations of the petition, and denying the jurisdiction of the Federal court.

To this plea the defendants filed an answer, and both parties filed affidavits as to the facts.

From these affidavits it appears that in September, 1871, the defendants Ziebold and Hagelin, purchased the property described in the pleadings, and known as "The Brewery," situated in Atchison county, Kansas, for the sole use and purpose of manufacturing beer, and that it was then worth $25,000. That they afterwards, and up to the time when the prohibition law was enacted, put improvements upon the property, so that the value of the same together with the attachments, amounted in 1880, to the sum of $54,175.

That at the time of the purchase of the brewery, and when the improvements were made thereon, the laws of Kansas permitted the manufacture of beer, and that the property is unfit for any other purpose.

On October 25th, 1886, the circuit court of the United States for the District of Kansas, overruled the plea in abatement, and retained the case for further proceedings.

The circuit court ordered the parties to recast the pleadings so as to conform them to the rules of pleading in equity, and on February 4th, 1887, the appellant filed in said court a bill setting forth the same facts as stated in the original information, to which the defendants answered, admitting that they owned the brewery, and operated the same for the manufacture of beer, "and keeping the same for sale, and

that it is a place where such liquor is manufactured and kept for sale." They also admit that they have no permit from the probate judge of Atchison county, Kansas, for the manufacture and sale of beer, as required by the Kansas prohibitory law, but allege that the law violates the Constitution of the United States and is void. The answer also pleads the same facts before set up by defendants and hereinbefore recited.

On February 10th, 1887, the circuit court found for the defendants and dismissed the bill, from which finding and decree the complainant appealed to this Court.

POINTS AND AUTHORITIES.

First. The amendment to the constitution of Kansas, adopted November 2d, 1880, which declares that "the manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific, and mechanical purposes;" and the statutes of Kansas afterwards enacted punishing any person who "shall manufacture, sell, or barter any spirituous, malt, vinous, fermented, or other intoxicating liquors, except for medical, scientific, and mechanical purposes," are in violation of Article Fourteen of the Constitution of the United States, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The same questions are presented in this case as in the

cases of The State of Kansas vs. Mugler, which were argued at the last term and are now pending.

In one of the Mugler cases the defendant was indicted for manufacturing beer, and after simply showing that he had manufactured, the State rested its case and the defendant was convicted. There was no charge in the indictment that the defendant manufactured beer for sale or barter in the State of Kansas, and no proof or attempt to prove such fact, but the naked act of manufacturing beer in the State was held to constitute crime.

In this case the prosecutor has sought to evade the argument in the Mugler case against the constitutional amendment and statute of Kansas, by charging in the information and in the bill afterwards filed in the circuit court that the defendants "*manufactured beer for barter, sale, or gift in the State of Kansas.*"

This is an evasion of the true meaning and intendment of the Kansas legislation and the results in argument legitimately springing therefrom.

The real question, which is conclusive of all the pending cases, is whether the constitutional amendment and the subsequent statutes of Kansas absolutely prohibiting the manufacture of beer in the State, except for three specified purposes, violate the Fourteenth Article of the Federal Constitution.

If they do, then no proceeding, civil or criminal, based upon the amendment or statutes, can be sustained.

It is true that the defendants admit in their pleading that their brewery was used for "manufacturing beer and keeping the same for sale, and is a place where such liquor was manufactured and kept for sale," but they allege, at the

same time, that the law under which it is sought to destroy their business is unconstitutional and void. If this be so the plea is good, no matter what feature of the amendment or statutes renders them void.

In stating the propositions involved the counsel for appellant says that "the plea contains one paragraph that is not repeated in the allegations of the amended bill or admitted in the answer—i. e., that the said defendants are not by this proceeding deprived of the free and unrestricted use and enjoyment of the premises for the purpose of preparing and manufacturing beer for other markets, and for barter, sale, and gift in other States."

It would be sufficient reply to state that this case is now presented upon the bill and answer only, but we do not propose that the counsel shall amend and patch up the amendment and statutes of Kansas in his pleading so as to escape their meaning and legal effect.

The constitutional amendment provides and the subsequent statutes enact that beer shall not be manufactured in the State except for medical, scientific, and mechanical purposes.

The language is so plain and comprehensive that it is unnecessary to evoke the axiomatic rule that penal enactments must be strictly construed. The manufacture is prohibited for all but the specified purposes, and no person can manufacture beer in the State of Kansas for any other purpose.

If there could be any doubt of this the statute enacted to enforce the constitutional amendment furnishes conclusive proof. It provides that "no person shall manufacture or assist in the manufacture of intoxicating liquors in this

State except for medical, scientific, and mechanical purposes," and the law throughout shows conclusively that its object is to prevent the use of intoxicating liquors by prohibiting the manufacture for a beverage or for any but three specified purposes.

The sixteenth section (page 40 of transcript) provides that "every person who shall, directly or indirectly, keep or maintain, by himself or by association or combining with others, or who shall in any manner aid, assist, or abet in keeping or maintaining any club room or other place in which any intoxicating liquor is received or kept for the purpose of use, gift, barter, or sale as a beverage," shall be deemed guilty, &c.

If the constitutional amendment and statutes of Kansas prohibit the manufacture of beer, for exportation or storage or personal use, they violate the Federal Constitution by denying rights which belong to every citizen as a citizen of the United States.

It will not do for opposing counsel to say that "if the property used by the defendants is of undiminished value if used for the purpose of manufacturing for barter, sale, and gift in other parts of the sovereignty of the United States, and if, by these proceedings, the defendants are not restricted in the use and enjoyment of these premises for such purposes, then they are not deprived of their property or of the use of it or of any value within the guarantee of the Fourteenth Amendment."

The constitutional amendment and statutes of Kansas, which constitute the basis of this action, and without which it cannot exist, do not stop at prohibiting the manufacture of beer for barter and sale in Kansas, but they absolutely

prohibit the manufacture in the State except for three specified objects, in which the manufacture for sale and barter in other States is not included.

These enactments must stand or fall upon their own legal effect, and not upon the changing and uncertain pleadings of prosecuting officers.

We concede freely that the Fourteenth Article of the Federal Constitution is intended to protect the rights of individuals as citizens of the United States, but no State has the power to deprive any such citizen of the right to manufacture any article, unless its manufacture endangers or injures the lives or property of others.

The police power is given the States to protect the health and morals of its citizens, but no convention or legislature can, under the guise of exercising this power, take from the citizen his right to manufacture beer unless the process of its manufacture or the existence of the beer afterwards injuriously affects others.

It is not pretended these effects follow and without them the power does not exist. Unless this be so the police power of the State could be used to deprive the citizen of the dearest and most sacred rights, and his personal tastes, habits, and even opinions, would be subject to unlimited tyranny.

"It is not difficult to find the rule which determines the limitations upon the lawful ways or manner of using lands. It is the rule which furnishes the solution of every problem in the law of police power and which is comprehended in the legal maxim, *sic utere tuo, ut alienum non laedas.*

Tiedman's Limitations of Police Power, 426–7, §122a.

In the case of Jacobs, 98th N. Y., 98, commonly called The Tenement House Cigar Case, the court of appeals of

New York clearly defined the judicial power in matters of nuisance. The Legislature of New York had enacted that in cities of more than five hundred thousand inhabitants in any tenement house occupied by more than three families, except on the first floor of the house, on which there may be a store for the sale of cigars and tobacco, it should be a misdemeanor to manufacture cigars.

The facts in the case were shown to be that the defendant did not injuriously affect others by the manufacture of cigars in his own room, and Judge Earle said in delivering the opinion:

"It is plain that this law interferes with the profitable and free use of his property by the owner or lessee of a tenement house, who is a cigarmaker, and trammels him in the application of his industry and the disposition of his labor, and that, in a strictly legitimate sense, it arbitrarily deprives him of his property and of some portion of his personal liberty. The constitutional guaranty that no person shall be deprived of his property without due process of law may be thus violated without the physical taking of property for public or private use. This guarantee would be of little worth if the Legislature could, without compensation, destroy property or its value, deprive the owner of its use, deny him the right to live in his own house or to work at any lawful trade therein."

In speaking of the limitations upon the police power of the Government he continues:

"Under it the conduct of an individual and the use of property may be regulated so as to interfere to some extent with the freedom of the one and the enjoyment of the other, and in cases of great emergency, engendering overruling necessity, property may be taken and destroyed without compensation and without what is commonly called due process of law. The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and exten-

sive, is not above the Constitution. It furnishes the supreme law, and so far as it imposes restraints, the police power must be exercised in subordination thereto." * * * "Generally it is for the Legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and whether its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is subject to the review of the courts. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health."

Munn *vs.* People of Illinois, 4 Otto, 83–4.

Butchers' Union, &c., Co. *vs.* Crescent City, &c., 111 U. S. 588.

Cooley's Constitutional Limitations, 385.

Lake View *vs.* Rose Hill Cem. Co., 70 Ills., 191.

T. W. & W. R. W. Co. *vs.* City of Jacksonville, 67 Ills., 37–40.

Intoxicating Liquor Cases, 25 Kansas, 765.

Calder and Wife *vs.* Bull, 3 Dallas, 386.

Fletcher *vs.* Peck, 6 Cranch., 135.

Taylor *vs.* Porter, 4 Hill, 146.

Dash *vs.* Van Kleeck, 7 Johns., 477.

Goshen *vs.* Stonington, 4 Conn., 225.

Wilkinson *vs.* Leland, 2 Peters, 657.

Corfield *vs.* Coryell, 4 Wash. C. C., 371.

In the Slaughter-house Cases Justice Miller enumerates the rights of individuals as citizens of the United States, and says:

"To these may be added the right secured by the thir-

teenth and fifteenth articles of amendment and by the other clause of the fourteenth next to be considered."

The clause referred to is as follows:

"Nor shall any State deprive any person of life, liberty, or property without due process of law."

"Due process of law in each particular case means such an exertion of the power of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

Cooley's Const. Lim., 356.
Wynehamer *vs.* People, 13 New York, 432.
State *vs.* Allen, 2 McCord, 56.
Sears *vs.* Cottrell, 5 Mich., 251.
Taylor *vs.* Porter, 4 Hill, 140.
Hoke *vs.* Henderson, 4 Dev., 15.
James *vs.* Reynolds, 2 Texas, 251.
Kennard *vs.* Louisiana, 92 U. S., 478.
Murray's Lessee *vs.* Hoboken Land Co., 18 How., 276.

Second. The defendants are deprived of their property without due process of law directly and absolutely by the provisions of the constitutional amendment and statutes of Kansas prohibiting the manufactute of beer except for medical, scientific, and mechanical purposes.

The facts as shown by the affidavits of many witnesses are that defendants had invested nearly $60,000 in the brewery and fixtures which it is sought to condemn as a nuisance. At the time this investment was made the laws of Kansas placed no restriction upon the manufacture of beer for any purpose, and the question now presented is whether the value of this property can be destroyed by the constitutional

amendment and statutes of Kansas, as is attempted in this case, without compensation to the owners.

As this proposition was fully argued in the Mugler cases now pending, and as we are confident that the constitutional amendment and statutes of Kansas prohibiting the manufacture of beer except for the purposes specified violates the Fourteenth Article of the Federal Constitution, we shall only refer to the authorities cited heretofore in the pending cases of the State of Kansas *vs.* Mugler.

Bartemeyer *vs.* Iowa, 18 Wall., 930.

Beer Company *vs.* Massachusetts, 97 U. S., 25.

Wynehamer *vs.* The People, 13th Kernan, 387.

Opinion of Justice Field in Munn *vs.* Illinois, 4 Otto, 113 and 90.

Pumpelly *vs.* Green Bay Co., 13 Wall., 177.

Tenement House Cigar Cases, 98 N. Y., 98.

Beebe *vs.* State, 6th Ind., 501.

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